Supreme Court, U.S.
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No. 95-315

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

US WEST, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether 47 U.S.C. 533(b), which prohibits local telephone companies from directly providing video programming to subscribers in their telephone service areas, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States, the Federal Communications Commission, and Janet Reno, in her official capacity as the Attorney General of the United States. Petitioners were defendants-appellants below in the *US West* litigation and defendants-appellees in the *Pacific Telesis* litigation.

Respondents US West, Inc., US West Communications, US West Multimedia Communications, Inc., Washington Independent Telephone Association, and Pacific Telecom, Inc., were plaintiffs-appellees in the *US West* litigation. Respondents Pacific Telesis Group, Pacific Bell, and Nevada Bell were plaintiffs-appellants in the *Pacific Telesis* litigation. The California Cable Television Association was an intervenor-defendant and appellee in the *Pacific Telesis* case and is a respondent under this Court's Rule 12.4.

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The Solicitor General, on behalf of the United States, the Federal Communications Commission, and the Attorney General of the United States, respectfully petitions for a writ of certiorari to review two judgments of the United States Court of Appeals for the Ninth Circuit. This petition is submitted pursuant to this Court's Rule 12.2, which permits the filing of a single petition for a writ of certiorari "[w]hen two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions."

OPINIONS BELOW

The opinion of the court of appeals in *US West, Inc.* v. *United States* (App., *infra*, 1a-32a) is reported at 48 F.3d 1092. The opinion of the district court in *US West* (App., *infra*, 35a-56a) is reported at 855 F. Supp.

1184. The opinion of the court of appeals in *Pacific Telesis Group* v. *United States* (App., *infra*, 33a-34a) is reported at 48 F.3d 1106. The order of the district court denying a preliminary injunction in *Pacific Telesis* (App., *infra*, 57a-58a) is unreported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on December 30, 1994. An amended decision in *US West* was issued on February 17, 1995. Petitions for rehearing in both cases were denied on May 25, 1995. App., *infra*, 81a-82a, 83a-84a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The text of 47 U.S.C. 533(b) is set forth in the Appendix, *infra*, 85a-86a.

STATEMENT

These cases involve a First Amendment challenge to 47 U.S.C. 533(b), a cross-ownership regulation of the market for cable television services that prohibits local telephone companies (local exchange carriers or LECs) from directly providing video programming, by means of a cable system, to subscribers in their local service areas. The First Amendment issues presented in these cases are identical to those presented in *United States* v. *Chesapeake & Potomac Telephone Co.*, cert. granted, No. 94-1893 (June 26, 1995), and *National Cable Television Association* v. *Bell*

Atlantic Corporation, cert. granted, No. 94-1900 (June 26, 1995).

Section 533(b) was enacted as part of Congress's comprehensive regulation of the cable industry in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Cable Act or 1984 Cable Act); see § 2, 98 Stat. 2785. Section 533(b) codified, in large part, a similar bar on cross-ownership of local telephone companies and cable systems in the same service area promulgated by the Federal Communications Commission (FCC) in 1970. See 47 C.F.R. 64.601 (1971); *In re Applications of Tel. Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307 (1970), aff'd *sub nom. General Tel. Co.* v. *United States*, 449 F.2d 846 (5th Cir. 1971). The statute contains several exceptions to the general prohibitions, also derived from the FCC's regulatory regime. Under Section 533(b)(3), local telephone companies may freely provide video programming to their local exchange customers who reside in a "rural area," as defined by the FCC. LECs may also seek a waiver of the cross-ownership bar for those areas where cable service "demonstrably could not exist" except if provided through a LEC-affiliated entity. 47 U.S.C. 533(b)(4). Finally, Congress authorized the FCC to waive the cross-ownership bar "upon other showing of good cause * * * [and] upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection." *Ibid.*

1. *US West litigation.* In *US West, Inc.* v. *United States*, a First Amendment challenge to Section 533(b) was brought by two LECs operating in the

State of Washington, the affiliates of one LEC, and a trade association of LECs that wish to provide cable television programming directly to subscribers in their common carrier service areas (collectively US West). The district court granted summary judgment for US West, concluding that Section 533(b) violates the First Amendment. App., *infra*, 35a-56a. The district court held that Section 533(b) must be subject at least to "intermediate scrutiny," which requires that restrictions on speech, to pass constitutional muster, be "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." App., *infra*, 49a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). The court ruled that Section 533(b) fails intermediate scrutiny for lack of narrow tailoring. App., *infra*, 50a-55a.

The court of appeals affirmed. App., *infra*, 1a-31a. Like the district court, it held that Section 533(b) must survive "intermediate scrutiny" to satisfy the requirements of the First Amendment. App., *infra*, 10a-17a. Applying intermediate scrutiny, the court first considered whether Section 533(b) "actually further[s]" an important or substantial governmental interest. App., *infra*, 17a (emphasis omitted). While the court acknowledged that, on that point, it had to "accord substantial deference to the predictive judgments of Congress," *ibid.*, it concluded that the government could not show that, "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 18a. The court stressed that the 1984 Cable Act contains no express legislative findings relating to the cross-

ownership provisions. *Ibid.* The court also refused to consider the fact that Congress had declined to adopt several proposals to repeal Section 533(b), reasoning that those "failed legislative proposals * * * do not add up to a congressional finding that § 533(b) furthers any particular end." App., *infra*, 20a.

The court did find that the government had "raised an issue of fact as to whether § 533(b) actually furthers the interests it purports to serve." App., *infra*, 20a. Although the court rejected the government's argument that Section 533(b) prevents discrimination by LECs against potential competitors in affording access to the utility poles necessary to maintain and operate a cable system (*id.* at 21a-22a), as well as the argument that the cross-ownership bar promotes diversity of ownership of cable services (*id.* at 23a-25a), it concluded that the government had "submitted sufficient evidence to create an issue of fact" on one purpose furthered by Section 533(b) (App., *infra*, 26a). Specifically, it accepted that the cross-ownership bar might effectively prevent anti-competitive conduct by LECs by removing their incentive to subsidize affiliated cable entities with monopoly profits from their local telephone operations. *Id.* at 25a-27a. The court also found sufficient evidence to conclude that existing accounting safeguards are insufficient to prevent such cross-subsidization, and that "the structural solution of § 533(b) is therefore necessary." *Id.* at 26a.

Despite finding evidence that Section 533(b) is necessary to further a substantial governmental interest, the court of appeals held that the bar is unconstitutional because it is not sufficiently narrowly tailored. App., *infra*, 27a-31a. The court believed that "the procompetitive goals of § 533(b) can currently be

achieved through a variety of less speech-restrictive means." App., *infra*, 28a. For example, the court pointed to "comprehensive cost allocation and accounting rules" adopted by the FCC to contain cross-subsidization by LECs in the area of information services, and it concluded that "the government has not shown that existing or potential nonstructural rules are so ineffective as to justify a sweeping ban on speech as the only alternative." *Id.* at 29a. The court also noted that the FCC had suggested to Congress that LECs could provide video programming through structurally separated subsidiaries, and it questioned why generally applicable antitrust laws could not be strictly enforced to prevent anti-competitive conduct by LECs in the cable market. *Id.* at 30a.[1]

2. *Pacific Telesis litigation.* In *Pacific Telesis Group* v. *United States*, another First Amendment challenge to Section 533(b) was brought by LECs that provide local telephone service in the States of California and Nevada (collectively Pacific Telesis). The district court initially stayed the action pending the Ninth Circuit's decision in *GTE California, Inc.* v. *FCC*, 39 F.3d 940 (1994), which, it believed, raised the same First Amendment issues. See App., *infra*, 57a. Pacific Telesis nonetheless moved for a preliminary injunction, which the district court denied on the basis of its stay. *Id.* at 57a-58a.

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[1] The court found it unnecessary to consider whether Section 533(b) leaves open "ample alternative channels of communication," but it did note that LECs may communicate with their subscribers by media other than video programming, provide video programming to unaffiliated cable carriers, and disseminate video programming to the general public outside their service areas. App., *infra*, 31a.

Pacific Telesis appealed, and, while that appeal was pending, the Ninth Circuit ruled that the *GTE* case was moot. The Ninth Circuit consolidated the *Pacific Telesis* case with the government's appeal in *US West* for oral argument. On the basis of its decision in *US West* that Section 533(b) violates the First Amendment, the Ninth Circuit reversed the district court's denial of a preliminary injunction in *Pacific Telesis* and remanded the case for further proceedings. App., *infra*, 33a-34a.

3. *Proceedings After The Court of Appeals' Judgments.* On January 20, 1995, after entry of the court of appeals' judgments, the FCC issued a notice of proposed rulemaking, addressing its authority, under the "good cause" waiver provision of Section 533(b)(4) (see p. 3, *supra*), to waive the cross-ownership bar for the purpose of more narrowly tailoring the operation of Section 533(b) and avoiding the purported constitutional difficulties in the statute. See *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking*, 10 F.C.C. Rcd 4617 (1995). The FCC solicited comments on its tentative conclusion that it had authority to waive the bar to obviate potential constitutional difficulties with Section 533(b), and, in particular, that "good cause," which is "commonly interpreted to include changed circumstances," could be interpreted to cover the dramatically changed conditions in the cable industry since 1970, when the cross-ownership rule was first instituted. *Id.* at 4642. While the FCC's rulemaking was pending, the government petitioned for rehearing of the court of appeals' decisions in both *US West* and *Pacific Telesis*, and brought the rulemaking to the attention of the court.

On May 16, 1995, the FCC issued a Third Report and Order (App., *infra*, 59a-80a), formally construing Section 533(b)(4) to give it the authority "to grant waivers [to LECs] * * * allowing [them] to provide video programming [directly to subscribers] in their telephone service areas on video dialtone networks." App., *infra*, 60a.[2] The FCC concluded that its proposed reading of its waiver authority would "obviate[] the constitutional infirmities" perceived in the cross-ownership bar, *ibid.*, and make it "unnecessary for [the] courts to decide whether a complete prohibition on video programming by telephone companies in their exchange areas is constitutional," *id.* at 65a, because LECs will henceforth be able to provide video programming directly to subscribers in their service areas.

The FCC addressed two statutory issues in construing Section 533(b)(4): whether there is "good cause" to waive the cross-ownership bar, and whether such a waiver is "justified by the particular circumstances * * * taking into account the policy of [the bar]." App., *infra*, 67a. The FCC found at least two reasons to conclude that "good cause" exists to allow

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[2] The FCC issued the Third Report and Order as part of its ongoing rulemaking proceedings on "video dialtone." Video dialtone is a new service made possible by advances in technology that permit the transmission of video images over the telephone network. The FCC's video dialtone rules permit the transmission by telephone companies of video services by multiple programmers on a common carrier basis. See *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 F.C.C. Rcd 5781, 5783 (1992), modified in part on reconsideration, 10 F.C.C. Rcd 244 (1994).

LECs to provide video programming over video dialtone systems. First, it noted that " '[g]ood cause' is a phrase that is commonly associated with changed circumstances," *id.* at 69a, and it concluded that the growth in the cable industry from "a fledgling service to a more mature industry * * * [that will] not be extinguished before it is established" constitutes changed circumstances since Congress enacted the bar in 1984, *ibid.* Second, "significant advances in technology" such as video dialtone "have made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban." *Id.* at 70a-71a.

The FCC also concluded that waiving the bar to allow LECs to provide video programming via video dialtone would advance the policies of Section 533(b), namely, promoting competition and diversity in the market for video programming. App., *infra*, 71a-72a. The FCC emphasized that its video dialtone regulatory framework includes a common carriage element, such that a LEC offering video dialtone must make capacity available to other, unaffiliated video programmers. Thus, "[t]he common carrier aspect of video dialtone service promotes both competitive and free speech interests by making room for more than one speaker." *Ibid.*

On May 25, 1995, the court of appeals denied the government's petitions for rehearing in both *US West* and *Pacific Telesis*, without apparent consideration of the FCC's Third Report and Order. App., *infra*, 81a-82a, 83a-84a. On June 26, 1995, this Court granted review in two cases from the Fourth Circuit in which the same issues are presented. *United States* v.

Chesapeake & Potomac Tel. Co., No. 94-1893; *National Cable Television Ass'n* v. *Bell Atlantic Corp.*, No. 94-1900.

REASONS FOR GRANTING THE PETITION

This petition presents the same issue that is presented in *United States* v. *Chesapeake & Potomac Telephone Co.*, cert. granted, No. 94-1893 (June 26, 1995), and *National Cable Television Association* v. *Bell Atlantic Corporation*, cert. granted, No. 94-1900 (June 26, 1995). In these cases, as in the ones already before the Court on plenary review, a court of appeals has declared that 47 U.S.C. 533(b), an Act of Congress, is invalid under the First Amendment. In these cases, the court of appeals has also declined to consider a construction of the statute, adopted by the agency responsible for its administration, that would avoid the purported constitutional difficulties with the law.

Because the Court's decision in the cases on plenary review will control the outcome of these cases, we suggest that the Court hold this petition and dispose of it in light of the decision in *United States* v. *Chesapeake & Potomac Telephone Co.* and *National Cable Television Association* v. *Bell Atlantic Corp.*

CONCLUSION

The petition for a writ of certiorari should be held pending the decision of the Court in *United States* v. *Chesapeake & Potomac Telephone Co.*, No. 94-1893, and *National Cable Television Association* v. *Bell Atlantic Corporation*, No. 94-1900, and then disposed of as is appropriate in light of those cases.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

AUGUST 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35775

US WEST, INC.; US WEST COMMUNICATIONS; US WEST MULTIMEDIA COMMUNICATIONS, INC.,
PLAINTIFFS-APPELLEES

and

WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION; PACIFIC TELECOM, INC. (PTI), AND ITS SUBSIDIARIES,
PLAINTIFFS-INTERVENORS-APPELLEES

v.

UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION;
JANET RENO, ATTORNEY GENERAL,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

[Filed Dec. 30, 1994; Amended Feb. 17, 1995]

ORDER

BEFORE: ALARCON and HALL, Circuit Judges, and KING, District Judge*.

The motion of appellee Washington Independent Telephone Association to correct the opinion in this case is hereby GRANTED.

The opinion filed December 30, 1994, is amended in accordance with the opinion attached hereto.

OPINION

CYNTHIA HOLCOMB HALL, Circuit Judge:

US West, Inc. and several affiliated companies (hereinafter referred to collectively as "US West"), Pacific Telecom, Inc. and its subsidiaries ("PTI"), and the Washington Independent Telephone Association ("WITA") challenge the constitutionality of § 613(b) of the Cable Franchise Policy and Communications Act of 1984, Pub.L. No. 98-549, 98 Stat. 2785 (1984) (the "1984 Cable Act"). This provision, codified at 47 U.S.C. § 533(b), provides in pertinent part that:

> (1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.
>
> (2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

> chapter, to provide channels of communication or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

47 U.S.C. § 533(b)(3) provides an exception to the ban for telephone companies providing service in rural areas. Furthermore, the Federal Communications Commission ("FCC") has the authority to waive the prohibition under certain conditions. 47 U.S.C. § 533(b)(4).

"Video programming" is defined in 47 U.S.C. § 522(16) as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." The FCC has interpreted § 522(16) to require a comparison of material to be provided by the telephone company with television broadcast programming in 1984: video services of the type broadcast in 1984 are "video programming" and therefore covered by § 533(b), whereas services or material not broadcast in 1984 are not covered by the cross-ownership prohibition.[1]

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[1] *In re Telephone Company-Cable Television Cross-Ownership Rules (Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking)*, 7 FCCRcd. 5781, 5820 (1992) (hereinafter "*First Video Dialtone Order*"); *see also In re Telephone Company-Cable Television Cross-Ownership Rules (Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking)*, CC Docket No. 87-266, FCC 94-269 (released November 7, 1994), at ¶¶ 109-11 (affirming *First*

US West is a common carrier which provides local telephone service in 14 western and midwestern states. The company has applied for and been granted permission from the FCC to conduct a limited trial in Omaha, Nebraska, of "video dialtone service," which consists of constructing and making available transmission facilities for third parties' provision of video programming on a common carrier basis.[2] The FCC has concluded that such video dialtone services do not violate § 533(b) so long as the telephone company does not provide the programming material. *See First Video Dialtone Order*, 7 FCCRcd. at 5790. US West, PTI, and WITA, on behalf of numerous other Washington state local telephone companies, allege that they have or could quickly develop video dialtone facilities in numerous markets and would directly enter the video programming market in competition with local cable companies in their telephone service areas if the cross-ownership ban were removed. US West, PTI and WITA brought this constitutional challenge to § 533(b), claiming that the law violates the First Amendment both on its face and as applied, and asking that its enforcement be enjoined.

The district court granted summary judgment in favor of the plaintiffs. *US WEST, Inc. v. United States*, 855 F.Supp. 1184 (W.D.Wash.1994). The court rejected the government's contention that § 533(b) is

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Video Dialtone Order interpretation of "video programming") ("*Second Video Dialtone Order*").

[2] *See In re Application of US West Communications, Inc. for Authority Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Operate, Own and Maintain Facilities and Equipment to Provide Video Dialtone Service in Portions of the Omaha, Nebraska Service Area*, Order and Authorization, released Dec. 22, 1993 (hereinafter "*Omaha Video Dialtone Order*").

a structural regulation of the telecommunications market that should be subjected only to rational basis review. It also declined to decide whether § 533(b) should be subject to strict scrutiny as a speaker- or content-based restriction. Instead, the district court found that the provision is unconstitutional even under the lower, intermediate scrutiny applied to content-neutral time, place, and manner restrictions and laws of general application which impose an incidental burden on speech. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The district court held specifically that § 533(b) is not sufficiently narrowly tailored to serve a substantial government interest.

Several other courts have recently had occasion to pass on the constitutionality of § 533(b), including one other court of appeals. All have found it invalid under intermediate First Amendment scrutiny. *See Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir.1994) ("*C & P*"); *NYNEX Corporation v. United States*, No. 92-323-P-C (D. Maine Dec. 8, 1994); *Ameritech Corp. v. United States*, 867 F.Supp. 721 (N.D.Ill.1994); *BellSouth Corp. v. United States*, 868 F.Supp. 1335 (N.D.Ala.1994). We join those other courts in finding that § 533(b) unconstitutionally infringes on the plaintiffs' First Amendment right to free speech.

REGULATORY AND STATUTORY BACKGROUND

The telephone-cable cross-ownership prohibition began as a rule adopted by the FCC in 1970, prompted by concerns that telephone companies, if permitted to provide cable services in their telephone service areas, would monopolize the field because they would discriminate against independent providers and in favor of their affiliates, in granting access to tele-

phone poles and conduits.[3] A 1981 FCC report suggested that the pole access concerns underlying the ban no longer independently supported it, but recommended retaining the cross-ownership restriction due to other concerns, such as potential "cross-subsidization" of the telephone companies' cable operations from their monopolistic telephone operations.[4]

Congress adopted § 533(b) in 1984, as part of the comprehensive 1984 Cable Act. The Act contains no legislative findings concerning the cross-ownership ban. The only direct reference to the purpose of § 533(b) in the legislative history is a single sentence in a House report, indicating that the provision was intended "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers." H.R.Rep. No. 934, 98th Cong., 2d Sess. 56 (1984) ("*1984 House Report*"). The report also stated that a number of cross-ownership

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[3] *See Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems* (Final Report and Order), 21 F.C.C.2d 307, 323-25 (1970), *recons. in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom., General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir.1971) (the "*1970 Order*"). For a more detailed discussion of the history of § 533(b) and its predecessors, see *C & P*, 42 F.3d at 186-88.

[4] *See* FCC Office of Plans and Policy, *FCC Policy on Cable Ownership* 153-58, 162 (1981) ("*1981 FCC Report*"). Cross-subsidization involves improperly allocating common or joint costs of an unregulated activity (cable television) and a regulated activity (telephone service) to the regulated activity, in the hopes that the costs can be passed on to regulated ratepayers; and, at the same time, misallocating revenues from the regulated activity to the unregulated one. The combined effect of such practices would be to make the telephone companies' cable businesses unrealistically profitable and allow them to compete unfairly with the cable companies.

provisions, all codified in § 533, were intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." *Id.* at 55.

When the FCC's *1970 Order* was adopted, the cable industry was in its infancy. At that time, fewer than ten percent of American households had access to cable television. *See First Video Dialtone Order*, 7 FCCRcd. at 5848. The FCC feared that the telephone companies could easily stifle competition and monopolize the industry. In 1984, when Congress enacted § 533(b), the industry had developed considerably, but concerns of monopolization by the telephone companies remained.

Since then, however, the nature of the cable television industry has changed enormously. By 1992, access to cable had surpassed ninety-one percent of households. *Id.* at 5855-56. Today, almost all cable providers have monopolies in their local markets. *See, e.g.*, Affidavit of Thomas W. Hazlett at ¶ 3 (only 2% of households have a choice between two competing cable systems).

In the Cable Television Consumer Protection and Competition Act of 1992, Congress specifically found that "most cable television subscribers have no opportunity to select between competing cable systems," resulting in "undue market power for the cable operator as compared to that of consumers and video programmers." Pub.L. No. 102-385, § 2(a)(2), 106 Stat. 1460, 1460 (hereinafter the "1992 Cable Act"). Congress also found that the "cable industry has become highly concentrated" and that the "potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers." *Id.* § 2(a)(4). The five largest cable system operators in 1992 served over

forty percent of all cable subscribers in the entire country. *See C & P Telephone Co. v. United States*, 830 F.Supp. 909, 915 (E.D.Va.1993), *aff'd*, 42 F.3d 181 (4th Cir.1994) ("*C & P District Court*"). In 1991, the largest, Tele-Communications, Inc., served 9.6 million subscribers and had revenues of $3.8 billion; the second largest, Time Warner, had 6.8 million subscribers and total revenues from all sources of $12 billion. *Id.*

Although the Justice Department vigorously defends the constitutionality of § 533(b) in this litigation, other elements of the government, including the FCC and the Antitrust Division of the Justice Department, have advocated its repeal.[5] In June 1994,

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[5] *See In re Telephone Company-Cable Television Cross-Ownership Rules (Further Notice of Inquiry and Notice of Proposed Rulemaking)*, 3 FCCRcd. 5849, 5857-58 (1988) (the "*FNOI*") (FCC concluded that the "cross-ownership restrictions appear to have accomplished their purpose of preventing telephone companies from establishing a monopoly position in cable television service that would have precluded the growth and success of an independent cable industry" and "tentatively conclude[d] that the costs of the cross-ownership ban exceed the benefits and that the public interest would be better served by a regulatory framework generally allowing telephone companies to provide cable television service subject to appropriate safeguards"); Reply Comments of the United States Department of Justice, *In re Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt. No. 87-266 (Mar. 13, 1992), at 6 ("*DOJ Reply Comments*") (concluding that "the Department believes the Commission should advise Congress to repeal the Cable Act's telephone company-cable television cross-ownership restriction"); National Telecommunications and Information Administration, U.S. Department of Commerce, *The NTIA Infrastructure Report: Telecommunications in the Age of Information* 230-35 (1991) (the "*NTIA Report*") (concluding that § 533(b) should be repealed and noting that NTIA had advocated that position before Congress in 1990); *First Video Dialtone Order*, 7 FCCRcd. at 5847 (formally recommending

the House of Representatives passed a bill which would have repealed § 533(b). The Senate Commerce Committee approved similar legislation, but the measure died when it did not come to a vote in the full Senate before the end of the session.

STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment de novo. *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994). Summary judgment is proper if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The dispute about a material issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In ruling on a summary judgment motion, the court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249, 106 S.Ct. at 2511.

DISCUSSION

I.

The analysis of this case must be heavily influenced by the Supreme Court's recent decision in *Turner Broadcasting System, Inc. v. FCC*, — U.S. ——, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). *Turner* was a challenge by cable television operators and pro-

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that Congress repeal § 533(b)); *Second Video Dialtone Order* at ¶¶ 124-25 (affirming recommendation that § 533(b) cross-ownership ban be repealed).

gramming providers to the "must-carry" provisions of the 1992 Cable Act. 47 U.S.C. §§ 534-35. These rules required most cable operators to set aside channel space to carry the signals of specified local commercial and public television broadcast stations. *See Turner*, —— U.S. at ——, 114 S.Ct. at 2453. The cable operators challenged the requirement arguing, among other things, that must-carry violated the First Amendment both because it constituted forced speech and because it reduced the number of channels they had direct programming control over. The cable programmers argued that must-carry infringed on their First Amendment rights by making it more difficult for programmers to compete for carriage on the remaining channels.

At the outset of its analysis in *Turner*, the Court stated unequivocally that:

> [t]here can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.

Id. at ——, 114 S.Ct. at 2456. Section 533(b) burdens the plaintiffs' First Amendment rights by expressly prohibiting them from directly engaging in this form of speech within a certain area. The defendants and their *amici* do not appear to dispute this proposition.

II.

Because § 533(b) implicates the plaintiffs' First Amendment rights, we must determine what level of scrutiny should be applied in our review of the provision. Not surprisingly, the parties disagree considerably on this question.

(a) Rational Basis Review

The United States argues, as it did in the district court, that § 533(b) should be reviewed under the highly deferential, rational basis standard of *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978) ("*NCCB*"), in which the Supreme Court upheld a cross-ownership rule prohibiting common ownership of a radio or television broadcast station and a daily newspaper located in the same market. *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). The Court held in *NCCB* that the newspaper-broadcast cross-ownership regulations were valid under the First Amendment as "reasonable means of promoting the public interest in diversified mass communications." *NCCB*, 436 U.S. at 802, 98 S.Ct. at 2115.

The government contends that § 533(b) is a similar market structure regulation, intended to promote competition in the cable industry by preventing the telephone companies from monopolizing the field. Since § 533(b) is not content-based, it concludes, this court should uphold the provision so long as it is "reasonable."

The government's argument, however, fails adequately to deal with the fact that *NCCB*, *Red Lion*, and other broadcast regulation cases are based on the "scarcity rationale," which makes them fundamentally different from other First Amendment cases. The Court emphasized in *NCCB* that "there is no 'unabridgeable First Amendment right to *broadcast* comparable to the right of every individual to speak, write, or publish.'" *Id.* at 799, 98 S.Ct. at 2114 (quoting *Red Lion*, 395 U.S. at 388, 89 S.Ct. at 1806) (emphasis added). The basis for according the

broadcast media less protection derived from the

> physical limitations of the broadcast spectrum . . . Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential . . . .

Id.

NCCB and *Red Lion* are distinguishable from the present case because the scarcity rationale does not apply to the cable television industry. In *Turner*, the Supreme Court held that the "application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation," because "cable television does not suffer from the inherent limitations that characterize the broadcast medium [and there is no] danger of physical interference between two cable speakers attempting to share the same channel." —— U.S. at ——, 114 S.Ct. at 2457. Thus, for example, two competing cable concerns could each run wires to every home in a community, giving consumers greater choices in service, without any risk of interfering with each other's signals.

The Court reaffirmed in *Turner* that the scarcity rationale drove its analysis in the broadcast cases and that it does not apply to the cable industry. Because the government fails convincingly to distinguish *Turner*, we reject the government's contention that § 533(b) should be analyzed under a rational basis test.

(b) *Strict Scrutiny*

US West for its part urges us to apply strict scrutiny, arguing that § 533(b) operates as a content- or speaker-based restriction on speech. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988) (content-based regulation on political speech in a public forum must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end") (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)). A law that burdens First Amendment rights on the basis of the content of the speech regulated must generally be subjected to strict scrutiny. That a regulation is content-based can in some cases be found from an examination of the plain language of the law itself. *See Turner*, —— U.S. at ——, 114 S.Ct. at 2459. Content-based discrimination may also be discerned from a finding that the regulation's "manifest purpose is to regulate speech because of the message it conveys." *Id.* at ——, 114 S.Ct. at 2461 (citing *United States v. Eichman*, 496 U.S. 310, 315, 110 S.Ct. 2404, 2408, 110 L.Ed.2d 287 (1990)). We find that § 533(b) is content-based under neither inquiry.

Section 533(b) regulates the provision of "video programming" by telephone companies. The FCC has interpreted the definition of "video programming" in § 522(16) to require a comparison between the material to be provided by the telephone company and broadcast television in 1984. *See First Video Dialtone Order*, 7 FCCRcd. at 5820. US West contends that the FCC will therefore be required to determine the applicability of § 533(b)'s ban to specific proposed video services on a "case-by-case [basis], based on a

detailed examination of the content of the video communications at issue." US West Brief at 32. While conceding that the process contemplated by the FCC is facially *viewpoint*-neutral, US West relies on *FCC v. League of Women Voters*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), for the proposition that government scrutiny of the content of speech triggers strict scrutiny regardless of whether there is any "evidence of an improper censorial motive." *Arkansas Writers' Project*, 481 U.S. at 228, 107 S.Ct. at 1727.

US West reads these cases too broadly. The Supreme Court in *Turner* canvassed in considerable detail its First Amendment precedents and noted that the "principal inquiry" in determining whether a regulation is content-neutral or content-based, "is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." —— U.S. at ——, 114 S.Ct. at 2459 (quoting *Ward*, 491 U.S. at 791, 109 S.Ct. at 2754). Sections 533(b) and 522(16) are not "laws that by their terms distinguish favored speech from disfavored speech *on the basis of the ideas or views expressed.*" *Id.* (emphasis added). Rather, the review of content required under § 522(16) appears to be limited to inquiring whether the *type* of programming at issue was broadcast on television in 1984. *See First Video Dialtone Order*, 7 FCCRcd. at 5820-23 (broadcast television was "one-way" in 1984—and this type of material is "video programming" under § 522(16)—whereas modern technology allows for "interactive" or "two-way" programming—which would not be proscribed "video programming"); *1984 House Report* at 41-44, 56-57. The determination of

whether a given type of programming existed in the broadcast television medium in 1984 should end the inquiry, with no consideration of the ideas or views contained within the programs, and no room to favor or disfavor on the basis of content. *See C & P*, 42 F.3d at 193 ("that a regulation requires some examination of the speech upon which it has impact does not make the regulation content-based").

Nor is the "manifest purpose" of the cross-ownership ban "to regulate speech because of the message it conveys." What little legislative history there is for § 533(b) suggests that Congress' concern was to prevent the monopolization of the cable industry by the telephone companies. *See 1984 House Report* at 55. There is no indication that Congress intended to favor or disfavor any particular message.

US West further argues that § 533(b) should be subject to strict scrutiny because it is a "speaker-based" regulation which imposes unequal burdens on a distinct group of persons, namely the local telephone companies. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986) (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978)); *League of Women Voters*, 468 U.S. at 384, 104 S.Ct. at 3119; *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S.Ct. 612, 649, 46 L.Ed.2d 659 (1976) (government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others"). The Supreme Court, however, rejected a largely similar argument in *Turner*.

The Court first flatly rejected the contention that all regulations distinguishing among speakers warrant strict scrutiny. *Turner*, —— U.S. at ——, 114 S.Ct. at 2467. Rather, it held that "speaker-based

laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Id.* In effect, the Court thus collapsed the speaker-based inquiry into the content-based one. Because, as discussed above, Congress does not appear to have enacted § 533(b) based on the content of the telephone companies' or cable companies' speech, we also reject US West's speaker-based argument for strict scrutiny.

(c) *Intermediate Scrutiny*

The parties agree that if we reject rational basis review and strict scrutiny, then § 533(b) should be reviewed under intermediate scrutiny, as developed in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), *Ward*, and *Turner*. As discussed above, the Court in *Turner* rejected rational basis review and strict scrutiny for the must-carry provisions of the 1992 Cable Act. It emphasized, however, that "laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State.'" *Turner*, —— U.S. at ——, 114 S.Ct. at 2458 (quoting *Arkansas Writers' Project*, 481 U.S. at 228, 107 S.Ct. at 1727), and therefore "are always subject to at least some degree of heightened First Amendment scrutiny." *Id.* The Court concluded that because "the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers," *id.*, "the appropriate standard . . . is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Id.* at ——, 114 S.Ct. at 2469.

By the same token, § 533(b) imposes "special burdens" upon the telephone companies and confers considerable benefits upon the cable companies. We therefore follow the lead of the Supreme Court in *Turner* and apply intermediate scrutiny.

III.

Intermediate scrutiny asks if a challenged government regulation which is content-neutral:

> furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Turner, —— U.S. at ——, 114 S.Ct. at 2469 (quoting *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679). In addition, a reviewing court should consider whether the regulation leaves open "ample alternative channels of communication." *Ward*, 491 U.S. at 802, 109 S.Ct. at 2760. As discussed more fully below, we hold that § 533(b) is not sufficiently narrowly tailored and therefore fails intermediate scrutiny.

(a) *Does § 533(b) further an important or substantial government interest?*

Legislation subject to intermediate First Amendment scrutiny must actually *further* the interests posited by the government. Thus, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, —— U.S. at ——, 114 S.Ct. at 2470 (citations omitted) (plurality opinion).

Courts must, however, "accord substantial deference to the predictive judgments of Congress." *Id.* at ——, 114 S.Ct. at 2471. The *Turner* Court noted that

"Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as" cable television regulation. *Id.* (citing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n. 12, 105 S.Ct. 3180, 3194 n. 12, 87 L.Ed.2d 220 (1985)). Nonetheless, the fact that "Congress' predictive judgments are entitled to substantial deference does not mean . . . that they are insulated from meaningful judicial review altogether." *Id.* Instead, the government must show that "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.*

The evidence submitted in support of the cross-motions for summary judgment shows clearly that the government cannot make any such showing as to *Congress's* predictive judgments. The 1984 Cable Act contains no legislative findings relating to the cross-ownership provisions. *Compare id.* at ——, 114 S.Ct. at 2461 (1992 Cable Act contained "unusually detailed statutory findings" in which Congress explained the problems it found in the industry and the reasons for the solutions it adopted). Furthermore, the only legislative history directly addressing the purpose of § 533(b) consists of a single sentence in a House report noting that the section codified the existing FCC cross-ownership rule. *1984 House Report* at 56. Another sentence in the report stated that § 533 as a whole, which includes other cross-ownership restrictions, was intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." *Id.* at 55. This record suggests that Congress has made few "predictive judgments" about the purpose and operation of § 533(b) to which this court could defer.

Congress has over the last several years held numerous hearings on the cross-ownership ban and considered and failed to pass several bills that would have repealed it. Some committee reports have recommended repeal, whereas others have concluded that § 533(b) continues to make good policy sense. The government argues that this subsequent legislative history indicates that Congress has carefully considered the pros and cons of repealing the ban and has concluded that the provision remains useful.

"Failed legislative proposals," however, "are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Central Bank v. First Interstate Bank*, —— U.S.——, ——, 114 S.Ct. 1439, 1453, 128 L.Ed.2d 119 (1994) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 2678, 110 L.Ed.2d 579 (1990)); *see also County of Washington v. Gunther*, 452 U.S. 161, 176 n. 16, 101 S.Ct. 2242, 2251 n. 16, 68 L.Ed.2d 751 (1981) ("We are normally hesitant to attach much weight to comments made after the passage of legislation. In view of the contradictory nature of these cited statements, we give them no weight at all.") (citation omitted). As discussed below, the arguments advanced by the government in support of the current utility of the cross-ownership ban appear to be weak. Additionally, Congress specifically found in 1992 that most cable operators currently have "undue market power," 1992 Cable Act, § 2(a)(2), 106 Stat. at 1460, a formal finding that casts doubt on the efficacy of a law the avowed purpose of which was to prevent concentration and encourage diversity of ownership in the cable industry.

A reviewing court must defer to congressional findings that a statute further its asserted goals. All that the government has proferred, however, are

"failed legislative proposals" and recommendations in committee reports, which do not add up to a congressional finding that § 533(b) furthers any particular end. The government has therefore failed to produce sufficient evidence to suggest that there is any relevant congressional intent to which this court could defer.

An absence of explicit findings or other evidence of congressional intent does not of course end our inquiry. Agency interpretations of § 533(b), however, for the most part provide little support for the government's argument that the provision advances important interests. As discussed *supra* note 5, several federal agencies, including the FCC and the Antitrust Division of the Justice Department, have concluded that any benefits of § 533(b) are outweighed by its anticompetitive effects and have advocated its repeal. Finally, we need give little deference to arguments advanced by Justice Department litigators in defense of the statute. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

Although it is a close question, we find that the government has nonetheless raised an issue of fact as to whether § 533(b) actually furthers the interests it purports to serve. The government argued in the district court that § 533(b) "serves to promote competition and to provide diversity of video programming because by keeping [telephone companies] out of the business of providing video programming in their telephone service areas, § 533(b) prevents potential anticompetitive behavior by the telephone companies." *US West*, 855 F.Supp. at 1191.

Fostering competition in the cable industry is a substantial government interest for First Amendment purposes. *See Turner*, —— U.S. at ——, 114 S.Ct. at 2469 ("promoting fair competition" in

television markets "is an important governmental interest"); *id.* at ——, 114 S.Ct. at 2470 ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order"). It is less clear, however, that § 533(b) furthers this interest. When it enacted the 1992 Cable Act, eight years after the 1984 Cable Act, Congress in fact found that the cable industry was excessively concentrated and that most cable operators did not face any competition. The government argues, however, that § 533(b) promotes competition in three ways. We find that upon closer examination, two of these rationales are not supported by the evidence. The government has, though, produced sufficient evidence on one to create a genuine issue of fact.

1. *Pole access*

The first way in which the government claims § 533(b) promotes competition and diversity of programming sources was also the original justification for the restriction in 1970, that the ban on provision of video programming removes any incentive the telephone companies might have to discriminate in pole and conduit access. *See 1970 Order*, 21 F.C.C.2d at 324-36. By 1981, however, three years before Congress enacted § 533(b), an official FCC study concluded that the "problem of pole access does not by itself justify banning cross-ownership." *1981 FCC Report* at 162.

Congress has never expressly relied upon pole and conduit access to support the cross-ownership ban. It has, however, passed legislation regulating the manner in which telephone companies control and sell access to their poles and conduits. *See* Pole Attachment Act of 1978, Pub.L. No. 95-234, § 6, 92

Stat. 35 (1978), codified as amended at 47 U.S.C. § 224 (1988). Today, some ninety-eight percent of American homes have access to cable, so the importance of pole access has greatly diminished. *See FNOI*, 3 FCCRcd. at 5854 ("the necessary access to poles and conduit to permit the growth of the cable industry has generally occurred").

Furthermore, § 533(b) prohibits only the provision of video *programming*, but not the provision of video *transport* services by telephone companies on a common carrier basis. *See First Video Dialtone Order*, 7 FCCRcd. at 5823 (concluding that telephone company video dialtone service is permissible under § 533(b)); *Omaha Video Dialtone Order* at 19 (granting US West authority to construct and operate a limited video transport service in Omaha, Nebraska). Pole and conduit access is basically a transport concern, not a programming one. The FCC's conclusion that § 533(b) does not prohibit video transport by the telephone companies means that § 533(b) does nothing to deter pole access discrimination: even under § 533(b), the telephone companies can compete in the transport market and will have the same incentives, if any, to discriminate as if § 533(b) were not in effect. This seriously undermines any argument that the provision furthers the government's interest in preventing pole access discrimination. Even if, as the government suggests, monopolization of the programming market is a separate concern from monopolization of the transport market, there is no evidence in the record suggesting that pole access is a *programming* concern. The government has not created a jury question on this point.

2. *Promotion of diversity*

The government next asserts that § 533(b) promotes diversity in the cable industry by stifling the "monopolistic tendencies which predispose [the telephone companies] to anticompetitive behavior." *US West*, 855 F.Supp. at 1192. At first glance, the notion that a prohibition on competition by the telephone companies actually *promotes* competition and diversity in the cable industry seems improbable. While the telephone companies may have posed a serious threat to the nascent cable industry in 1970, when the cross-ownership ban was first adopted, the situation is far different in 1994. Today, cable television is a multi-billion dollar business, and cable providers have service monopolies in virtually all communities.

The FCC found in the *First Video Dialtone Order* that "the risks of anticompetitive conduct by the local telephone companies in connection with the direct provision of video programming have been attenuated by the enormous growth of the cable industry" and that "there is little threat that the local telephone companies could preemptively eliminate competition and monopolize the market for video programming." 7 FCCRcd. at 5848-49; *see also id.* at 5848 & n.352 (noting that the cable operators are not "a fledgling industry unable to compete," and that many potential competitors argue that the cable monopolies prevent adequate public access to video programming and stifle diversity in video services). The agency concluded that its goals of promoting competition and increasing the diversity of services available to the public would therefore be served by eliminating the cross-ownership restriction and allowing the telephone companies to compete with the cable industry.

Id. at 5847; *see also Second Video Dialtone Order* at ¶ 265 (given the "enormous growth" of the cable industry, "the risk of telephone companies preemptively eliminating competition in the video marketplace has lessened significantly" and any remaining risk should be "addressed through our video dialtone framework and other appropriate regulatory safeguards"). The Antitrust Division of the Justice Department concurred, arguing that "[a]llowing telephone companies to own and directly provide video programming in their local exchange areas, subject to Commission safeguards, will have procompetitive benefits that outweigh any anticompetitive risks involved." *DOJ Reply Comments* at 6-7; *see also NTIA Report, supra* note 5.

The government now argues, however, that even if the cable companies are financially strong today, the telephone companies would in the long run use superior financial strength and unfair competitive practices to achieve a monopoly. The government has not, however, submitted any *evidence* tending to prove this proposition. Congress itself has not explicitly based the continuation of the cross-ownership ban on this ground, and several executive branch agencies have explicitly rejected it in calling for the repeal of § 533(b). Thus, this argument about long-term competitive risks appears only to have been expressly adopted by the Justice Department litigators in the various cases challenging § 533(b).

The long-term competitive effect of telephone company entry into the cable industry would normally present a strong case for judicial deference to the "predictive judgments" of Congress. Because Congress has not really made any judgments in this area, however, this court must exercise its responsibility to engage in independent judicial review.

Turner, —— U.S. at ——, 114 S.Ct. at 2471 (plurality opinion). We hold that the government has not created a genuine issue of fact on this question.

3. Cross-subsidization

Another concern expressed by the FCC, in its 1981 Report, was that telephone companies competing in the cable market would unfairly "cross-subsidize" their cable operations with profits from their regulated, monopolistic telephone operations. *See 1981 FCC Report* at 154-56. Again, Congress did not specifically mention this rationale when it enacted § 533(b). In its recommendation to Congress that § 533(b) be repealed, the FCC concluded that "existing safeguards . . . constitute an effective means of preventing cross-subsidization." *First Video Dialtone Order*, 7 FCCRcd. at 5828-29; *see also* Brief *amicus curiae* of the United States Telephone Association at 27-28 (noting that in the AT & T divestiture proceedings, the Justice Department has argued that existing regulatory safeguards *are* sufficient to prevent cross-subsidization by the regional telephone companies). These "existing safeguards" include comprehensive rules adopted in 1987 for allocating the joint costs of regulated and nonregulated activities.[6]

The cross-subsidization rationale also suffers from the same weakness as the pole access rationale, stemming from the fact that § 533(b) allows the telephone companies to compete in the video transport market. To the extent that a telephone

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[6] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, 2 FCCRcd. 1298, *reconsidered*, 2 FCCRcd. 6283 (1987), *further reconsideration*, 3 FCCRcd. 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C.Cir.1990) (the "*Joint Cost Order*").

company would be tempted to cross-subsidize, a substantial proportion of the costs it would improperly allocate would likely come from the construction of its video dialtone platform and transportation network, which has many costs in common with the companies' telephone businesses, and not from video programming, which does not.

The government submitted evidence, however, suggesting that such existing FCC safeguards are insufficient to prevent cross-subsidization, and that the structural solution of § 533(b) is therefore necessary. The General Accounting Office has expressed concerns that existing safeguards may not be sufficient, or sufficiently enforceable given FCC resources, to contain cross-subsidization. *See* General Accounting Office, *Telephone Communications: Controlling Cross-Subsidy Between Regulated and Competitive Service* 11, 55 (1987); General Accounting Office, *Telecommunications: FCC's Oversight Efforts to Prevent Cross-Subsidization* 2, 4, 5, 7-12 (1993). The government also submitted an affidavit in opposition to summary judgment that disputes the plaintiffs' argument about the importance of the transport/programming distinction. *See* Affidavit of Bruce M. Owen (arguing that allowing the telephone companies to compete in the video transport market would create *additional* incentives to cross-subsidize). In light of this conflicting evidence, we conclude that the government has created an issue of fact on the cross-subsidization argument.

In sum, we conclude that the government has submitted sufficient evidence to create an issue of fact as to whether § 533(b) promotes competition in the cable industry by reducing incentives to cross-subsidize. This factual issue, however, does not

suffice to defeat summary judgment because it is not *material* for summary judgment purposes in light of our finding below that § 533(b) fails the narrow tailoring requirement. *See Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

(b) *Is § 533(b) sufficiently narrowly-tailored?*

Discussion of the narrow tailoring requirement must begin, once again, with the Court's recent decision in *Turner*. The Court reaffirmed that under intermediate scrutiny, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." — U.S. at ——, 114 S.Ct. at 2469. The Court reformulated this conclusion in two different ways, and each side of this litigation seizes upon one of the formulations. The government stresses that a regulation need only "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758). The plaintiffs, on the other hand, argue that the means chosen must "not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (quoting *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758).

Section 533(b) is a complete ban on a protected form of speech by US West in a fourteen-state area, by PTI in an eleven-state area, and by the members of WITA within their telephone service areas. Such sweeping prohibitions are "suspect." *Edenfield v. Fane*, — U.S. ——, ——, 113 S.Ct. 1792, 1803, 123 L.Ed.2d 543 (1993) (quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963)). It seems

difficult to conclude that § 533(b) is narrowly tailored under either formulation of the requirement. Although a court should not, of course, invalidate legislation simply because it thinks a better law could have been enacted, it must nevertheless consider whether alternative solutions would achieve the government's goals with less restriction on protected speech. *See City of Cincinnati v. Discovery Network*, —— U.S. ——, —— n. 13, 113 S.Ct. 1505, 1510 n. 13, 123 L.Ed.2d 99 (1993) ("if there are numerous and obvious less-burdensome alternatives to the restriction . . . that is certainly a relevant consideration in determining whether the 'fit' between the ends and means is reasonable").

The plaintiffs submitted substantial evidence tending to show that the procompetitive goals of § 533(b) can currently be achieved through a variety of less speech-restrictive means. *See, e.g., First Video Dialtone Order*, 7 FCCRcd. at 5850 (concluding that both "structural separation" requirements less drastic than § 533(b)'s complete ban and various "nonstructural safeguards" would suffice to prevent anticompetitive behavior should Congress repeal § 533(b)). The government submitted no probative evidence to the contrary in response to the plaintiffs' summary judgment motions. To the extent that pole and conduit access remains a problem, for example, the government has submitted no evidence that shows why the Pole Attachment Act of 1978 does not sufficiently address the problem or could not be strengthened if necessary. *See C & P*, 42 F.3d at 200 ("If discriminatory pole access were the sole concern of Congress in enacting a prophylactic ban on a telephone company's ability to speak through video programming, then such a ban would plainly burden more speech than necessary. . . .") (quoting

C & P District Court, 830 F.Supp. at 930 n. 29); *see also Second Video Dialtone Order* at ¶ 285 (requesting comments regarding whether FCC pole and conduit access rules should be modified in video dialtone context).

The FCC's *Joint Cost Order* contains comprehensive cost allocation and accounting rules to combat cross-subsidization. The parties and various government agencies disagree as to how effective such rules are, and we found above that the government created an issue of fact as to whether § 533(b) actually prevents cross-subsidization. But even so, the government has not shown that existing or potential nonstructural rules are so ineffective as to justify a sweeping ban on speech as the only alternative. In its *First Video Dialtone Order*, the FCC made clear that it would assess the adequacy of existing safeguards in conjunction with each telephone company video dialtone proposal, 7 FCCRcd. at 5827, and would reevaluate its rules and regulations as a whole three years into the experiment to determine their effectiveness in light of actual experience. *Id.* at 5833; *see also Second Video Dialtone Order* at ¶¶ 146-223 (concluding that existing rules should suffice to control cross-subsidization of video dialtone services by telephone companies). The government does not show why this more speech-friendly plan would be ineffective.

In its recommendation to Congress that § 533(b) be repealed, the FCC suggested that telephone companies be allowed to compete in the video programming market, and that monopolization could be avoided in part by requiring that a portion of their transport volume be set aside for sale to unaffiliated third parties on a common carrier basis. *First Video Dialtone Order*, 7 FCCRcd. at 5850-51. The FCC

also noted that requiring that "the telephone companies provide video programming through a structurally separated video programming subsidiary," *id.* at 5847, would further reduce the risk of anti-competitive behavior. Such arrangements would help ensure that the telephone companies do not develop monopolies in the programming market, while allowing them to engage in considerably more protected speech. *Accord C & P*, 42 F.3d at 201-02. The FCC recently reaffirmed its conclusion that such safeguards would promote diversity while allowing the telephone companies to compete in the video programming market. *Second Video Dialtone Order* at ¶¶ 261-67.

Finally, the government has not shown that, in the current state of the cable industry, the general antitrust laws could not be strictly enforced in order to safeguard competition. The *C & P* district court noted, and we agree, that the "federal agencies charged with enforcement of the antitrust laws stand ready to guard against anti-competitive behavior in the video programming market, just as in any other industry." 830 F.Supp. at 931.

In the face of such significant evidence suggesting that § 533(b) is not narrowly tailored, the government must come forward with enough contrary evidence of its own to create a triable issue. On the basis of the record before us, we must conclude that it has failed to do so.

The government places much weight on the fact that Congress has considered and rejected several reform or repeal proposals in recent years and argues that this court should defer to the "implicit" congressional finding that no less restrictive alternatives would accomplish its goals. US West correctly responds, however, that the Supreme Court has often

stated that "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction." *LTV Corp.*, 496 U.S. at 650, 110 S.Ct. at 2678 (quoting *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 1359, 8 L.Ed.2d 590 (1962)). We do not accept evidence of congressional *inaction* as persuasive evidence, sufficient to raise a genuine issue of material fact, of Congress's having "found" anything. We therefore hold that the government has failed to create a genuine issue of fact regarding whether § 533(b) is narrowly tailored. We hold that it is not.

(c) *Does § 533(b) leave open ample alternative channels of communication?*

Section 533(b) prohibits telephone companies from directly providing "video programming" to their own local telephone subscribers. The provision leaves open, however, opportunities to communicate with local subscribers through other media; to provide video programming indirectly by contracting with other cable carriers; to carry other programmers' material through "video dialtone" service; and to engage freely in any video programming activity outside its telephone service area. In light of our holding that § 533(b) fails the narrow tailoring requirement, we find it unnecessary to decide whether these alternatives constitute "ample alternative channels of communication" for intermediate scrutiny purposes.

CONCLUSION

Section 533(b) fails the narrow tailoring requirement of the intermediate scrutiny test. Accordingly, we hold that the statutory provision is invalid under the First Amendment. The district court's grant of

summary judgment in favor of the plaintiffs is therefore AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16064

PACIFIC TELESIS GROUP;
PACIFIC BELL; NEVADA BELL,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.;
FEDERAL COMMUNICATIONS COMMISSION;
JANET RENO, ATTORNEY GENERAL,
DEFENDANTS-APPELLEES

and

CALIFORNIA CABLE TELEVISION ASSOCIATION,
INTERVENOR-APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

[Decided Dec. 30, 1994]

BEFORE: ALARCÓN and HALL, Circuit Judges, and KING,* District Judge.

CYNTHIA HOLCOMB HALL, Circuit Judge:

This case involves a First Amendment challenge to 47 U.S.C. § 533(b), the telephone company—cable television cross-ownership prohibition. The district

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* The Honorable Samuel P. King, Senior District Judge for the District of Hawaii, sitting by designation.

court stayed the proceedings pending resolution by this court of *GTE California, Inc. v. Federal Communications Commission*, 39 F.3d 940 (9th Cir.1994). After the stay was entered, the plaintiffs moved in the district court for a preliminary injunction against enforcement of § 533(b) pending resolution of this case. The district court summarily denied the application for a preliminary injunction, and this interlocutory appeal followed.

US West, Inc. v. United States, 48 F.3d 1092 (9th Cir.1994), raised the same First Amendment issue as the present case, and we consolidated the two cases for purposes of oral argument. In a separate published opinion in *US West*, filed along with this disposition, we hold that § 533(b) violates the First Amendment.

The district court's order denying preliminary injunctive relief is therefore REVERSED and the case is REMANDED for further proceedings consistent with this opinion and with the opinion in *US West*.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. C93-1523R

US WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MULTIMEDIA COMMUNICATIONS, INC.; WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION; AND PACIFIC TELECOM, INC.,
PLAINTIFFS

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; AND JANET RENO, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
DEFENDANTS

[Filed June 15, 1994]

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ROTHSTEIN, Chief Judge.

THIS MATTER comes before the court on cross-motions for summary judgment. Having considered the documents filed in support and in opposition, and having heard argument from counsel, the court finds and rules as follows:

I. BACKGROUND

A. The Parties

Plaintiff US WEST, Inc. ("US WEST"), a Colorado corporation, is the parent company of plaintiff US WEST Multimedia Communications, Inc. as well as plaintiff US WEST Communications, Inc., a common carrier providing local exchange telephone service in fourteen states, including Washington. These three entities wish to provide cable television service to the area served by US WEST Communications. Plaintiff Washington Independent Telephone Association ("WITA") is a non-profit trade association consisting of common carrier local telephone companies who provide service within Washington State. WITA includes many small and medium size companies, with service area ranges from as few as 75 access lines to as many as 600,000 access lines. Plaintiff Pacific Telecom, Inc. is a publicly-traded company with common carrier subsidiaries who provide local exchange telephone service in eleven states, including Washington.[1] Plaintiffs wish to provide cable television programming within their respective service areas and are precluded from doing so by the current prohibition contained in 47 U.S.C. § 533(b).

Plaintiffs have named as defendants the Federal Communications Commission ("FCC") and the United States Attorney General, Janet Reno. Since

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[1] The court has also received briefing in support of plaintiffs' motion from amicus curiae United States Telephone Association ("USTA"). USTA is a non-profit trade association of local telephone companies across the nation.

plaintiffs challenge the constitutionality of a federal statute, the United States is also a defendant.

B. The Challenged Statute

Plaintiffs challenge, on First Amendment grounds, the constitutionality of 47 U.S.C. § 533(b), which was enacted as part of 47 U.S.C. § 521 *et seq.*, the Cable Communications Policy Act of 1984 ("1984 Cable Act"). This section reads as follows:

> 553(b)(1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.
>
> (2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide channels of communication or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

47 U.S.C. Secs. 533(b)(1), (2).

"Video programming" is defined in the 1984 Cable Act as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19) (formerly § 602(16) of the 1984 Cable Act). The FCC has interpreted the language of the 1984 Cable Act "to prohibit only telephone company provision of

programming comparable to that provided by broadcast television stations in 1984." *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, ("FCC Video Dialtone Order")*, 7 FCC Rcd. 5781, 5820 (1992).

In the case of *Chesapeake and Potomac Tel. Co.* v. *United States* ("*C & P*"), 830 F.Supp. 909, 914 (E.D.Va.1993), a similar challenge to § 533(b), the statute was held unconstitutional by United States District Court Judge Thomas Ellis III and is currently on appeal.

C. The History of the Ban on Telephone Company Provision of Video Programming and Related Legislation/Regulation

1. 1970 FCC Rule

In 1970, the FCC adopted a rule barring "all telephone common carriers from furnishing CATV [community antenna television system (i.e. cable video programming)] service to the viewing public in their operating territory except when, for good cause shown, a waiver of this policy is granted." *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, Final Report and Order, ("*Section 214 Applications Order*"), 21 FCC2d 307, 325 (1970).

In its 1970 Section 214 Applications Order, the FCC discussed the reasoning behind its new rule as follows:

> The entry by a telephone company, directly or through an affiliate, into the retailing aspects of CATV services in the community within which it furnishes communications services can lead to undesirable consequences. This is because of the

monopoly position of the telephone company in the community, as a result of which it has effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems. Hence, the telephone company is in an effective position to preempt the market for this service which, at present, is essentially a monopoly service in most population centers. It can accomplish this by favoring its own or affiliated interest as against nonaffiliated interests in providing access to those pole lines or conduits. . . . *Section 214 Applications Order*, 21 FCC2d at 324, para. 46.

2. 1984 Enactment of the Cable Act

In 1984 Congress codified the FCC's 1970 rule in the 1984 Cable Act, found at 47 U.S.C. § 533(b). There is little in the way of legislative history concerning § 533(b). Congress made no findings of fact at the time of its enactment. The single Congressional reference to the section at issue here, at the time of passage of the 1984 Cable Act, is found in the House Committee Report which states that the "intent of section [533(b) is] to codify current FCC rules concerning the provision of video programming over cable systems by common carriers, . . ." H.R.Rep. No. 934, 98th Cong., 2d Sess. 56 (1984), U.S.Code Cong. & Admin.News 1984, pp. 4655, 4693.

Also in the House Report is a statement concerning the entire Section 533. As written at the time of the House Report, Section 533 contained prohibitions on cross-ownership between television broadcast stations and cable systems, between daily newspapers and cable systems, as well as the prohibition between ownership of telephone companies and cable programming providers. (The cross-

ownership prohibitions as to newspapers and cable systems was deleted from the final version of the law.) The report contained a statement that § 533 "establishes clearly-defined cross-ownership rules and standards to prevent the development of local media monopolies and to encourage a diversity of ownership of communications outlets." *Id.*, at 55, U.S.Code Cong. & Admin.News 1984, p. 4692.

Finally, the "Purpose and Summary" of the entire 1984 Cable Act contains a general statement concerning the Act as a whole which states that "[t]he legislation also contains provisions to assure that cable systems provide the widest possible diversity of information services and sources to the public, . . ." *Id.*, at 19, U.S.Code Cong. & Admin.News 1984, p. 4656.

3. Recommendations of Repeal of § 533(b)

Since the enactment of § 533(b) in 1984 there have been numerous recommendations by the relevant federal agencies calling for its repeal. In addition, several House and Senate committees have considered bills repealing this section of the statute.

a. FCC Recommendation of Repeal—1992 Video Dialtone Order

In 1992, the FCC issued its Video Dialtone Order, the culmination of a five-year rulemaking process. *See* 7 FCC Rcd. 5781, 5784-5785 (1992). In this order, the FCC recommended that Congress repeal 47 U.S.C. § 533(b). The FCC recommended:

> that [Congress] amend the Cable Act to permit the local telephone companies to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards. We find that such an amendment

> would further promote our overarching goals in this proceeding by increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services made available to the public . . . .

Video Dialtone Order, 7 FCC Rcd at 5847, para. 135.

The FCC noted that when it adopted the cross-ownership ban in 1970

> the Commission intended to prevent local telephone companies from using their poles and conduits to disadvantage independent cable operator competitors. Therefore, by precluding telephone companies from providing video programming directly to subscribers, the ban gave cable television operators an opportunity to firmly establish themselves as viable competitors.

Id., at 5848, para. 136 (footnote omitted).

In contrast, in its 1992 recommendation, after receiving public comment and studying the issue some five years, the FCC stated that it had concluded "that the risks of anticompetitive conduct by the local telephone companies in connection with the direct provision of video programming have been attenuated by the enormous growth of the cable industry." *Id.*, at 5848, para. 137.

In its Video Dialtone Order, the FCC also discussed how changes in the cable industry since 1970 had eliminated the rationales behind the 1970 rule. It stated that

> [w]hen the cross-ownership rules were adopted, cable television (then called CATV) reached approximately 9% of all homes and largely consisted of small, limited capacity systems in

> remote communities. Today, cable offers over 90 percent of American homes multichannel service and is now a $20 billion industry. Rather than a fledgling industry unable to compete, the cable industry holds a leading position in the delivery and provision of video programming to the American public. In this sense, the cross-ownership ban has fulfilled its purpose of ensuring that the cable industry is able to thrive. Given this widely changed competitive situation, we find it reasonable to conclude that, with appropriate safeguards on their entry, there is little threat that the local telephone companies could preemptively eliminate competition and monopolize the market for video programming services.

Id., at 5848-5849, para. 137 (footnotes omitted).

Additionally, the FCC stated that "any remaining risk of anticompetitive conduct by the local telephone companies is outweighed by the potential public interest benefits their entry would bring" as the diversity of video programming will increase and because, as the Department of Justice had argued in its reply comments, "vertical integration should increase rather than reduce available video programming." *Id.*, at 5849, para. 138 (citing the Reply Comments of the United States Department of Justice "DOJ," *In re Telephone Company—Cable Television Cross Ownership Rules, "DOJ Cross-Ownership Rules Reply,"* CC Docket No. 87-266, at 44-45 (Mar. 13, 1992)).

In addition, the FCC found "that the public will benefit greatly from the resulting increased competition in the video marketplace." *Video Dialtone Order*, 7 FCC Rcd at 5850, para. 140.

b. 1992 Recommendation of Repeal of § 533(b) by the Antitrust Division of the Department of Justice

In response to a proposed rulemaking by the FCC, which led to the Video Dialtone Order, the Communications and Finance Section of the Antitrust Division of the United States Department of Justice recommended that telephone companies, referred to as local exchange carriers ("LECs"), be permitted "to own and directly provide video programming." *DOJ Cross-Ownership Rules Reply, supra*, at 44. DOJ's response stated that "the Department believes that LEC provision of video programming will have procompetitive benefits that outweigh any anticompetitive risks involved." *Id.* In addition, DOJ indicated that its position was "consistent with its previous positions regarding the necessity of the cross ownership restriction" stating that where "the rationales for such restrictions are no longer valid, then they should be removed or, at least modified, to permit the marketplace to function freely" *Id.*, at 44, nt. 44.

DOJ enumerated the "procompetitive benefits" of allowing telephone companies to provide video programming, stating that "it will allow another competitor to enter the video programming market, . . . entry will increase the LECs' willingness to take the financial risk of developing broadband integrated networks . . . [and] vertical integration will allow them to achieve efficiencies." *Id.*, at 44-45.

Discussing vertical integration by the telephone companies, DOJ said that

> since the cable industry is already vertically integrated, it is unlikely that allowing the telephone companies to vertically integrate will have

> anticompetitive effects. It will just make them more effective competitors, and will create an alternative player with whom third parties can bargain to carry their programming.

Id., at 45.

Contrary to the position that DOJ has taken in this litigation, it said in its 1992 Cross-Ownership Rules Reply that it "disagree[d] with those parties who argue that allowing the LECs to own and provide their own video programming will not be procompetitive because it will allow them to engage in anticompetitive behavior. . . ." *Id.*, at 46, nt. 50.

As did the FCC, DOJ concluded that "because the benefits of allowing the LECs to provide video programming outweigh the anticompetitive risks involved they should be allowed to enter this market" and "support[ed] lifting the telephone company-cable television cross-ownership prohibition contained in the Cable Act." *Id.*, at 46-47.

c. 1991 Report by the United States Department of Commerce Recommendating Repeal of 533(b)

In 1991, the National Telecommunications and Information Administration ("NTIA"), a branch of the United States Department of Commerce, stated that local exchange carriers ("LECs") "should be permitted to offer [video] programming in their service areas" if subject to appropriate safeguards developed by the FCC. *The NTIA Infrastructure Report*, at 233 (October 1991).

In its report, NTIA stated that "[w]ell-developed safeguards can address two of the 'traditional' concerns [of permitting LECs to provide video programming], regarding cross-subsidization and also discrimination, as evidenced by the history of pole

attachment access and rates." *Id.* Specifically, the NTIA stated that the "FCC's accounting and cost allocation rules can adequately control the danger of cross-subsidization of a LEC's programming activities by its regulated operations" adding that "those rules are extensive and effective in controlling cross subsidy." *Id.*

NTIA also concluded that "[c]oncerns about discrimination, as in the case of pole attachments, can be addressed in several ways . . ." noting that "there is an elaborate statutory and regulatory mechanism in place to address pole attachment disputes." *Id.* Additionally, NTIA stated that pole access concerns "should be less serious than in the past, since nearly 90 percent of U.S. homes have access to cable television today." *Id.* NTIA also noted that the "anti-discrimination and pro-efficiency requirements of [current FCC rules concerning the] provision of enhanced services would be effective ways to satisfy" antidiscrimination goals. *Id.* Finally, NTIA concluded that "the likely benefits of LEC entry into the video programming business outweigh the potential costs of LEC provision of video programming, which either are overstated or can be effectively ameliorated by adapting existing regulatory safeguards." *Id.*, at 235.

Thus, the three expert federal agencies, including two of the defendants in this case, who have considered § 533(b), have unanimously concluded that it should be repealed.

4. Senate and House Subcommittee Reports

In addition to the concerns expressed by the FCC, DOJ and the NTIA surrounding § 533(b), several subcommittees of the House and Senate have considered numerous bills advocating its repeal. While

the limited legislative history discussed above in Section I.C.2. is the extent of any mention of § 533(b) by Congress as a whole, several subcommittees of the House and Senate have held hearings on the repeal of § 533(b). *See C & P*, 830 F.Supp. at 914-915, nt. 9 (listing subcommittee hearings). Since 1989, six bills have been introduced attempting to repeal § 533(b). *See C & P*, 830 F.Supp. at 915, nt. 10 (listing bills introduced). However, Congress has not modified or repealed § 533(b), even in light of the agency recommendations discussed above.

The most recent statement by any part of Congress concerning § 533(b) is found in the 1991 Senate Report which accompanied the 1992 Cable Act (which altered the regulation of cable television) which states that the Senate Committee on Commerce, Science, and Transportation believed that the prohibition contained in § 533(b) "enhance[d] competition." S.R. No. 92, 102d Cong., 1st Sess., at 47 (1991), U.S.Code Cong. & Admin.News 1992, pp. 1133, 1180.

D. Plaintiffs' Challenge to the Constitutionality of § 533(b)

Plaintiffs wish to provide cable television programming within their respective service areas and are precluded from doing so by the current prohibition contained in 47 U.S.C. § 533(b). Plaintiffs contend that § 533(b) abridges their rights of freedom of speech and freedom of the press in violation of the First Amendment of the United States Constitution, and move for summary judgment as to the unconstitutionality of the statute. Defendants have also moved for summary judgment, contending that § 533(b) is constitutional.

II. DISCUSSION

A. Summary Judgment Standard

The parties have cross-moved for summary judgment. A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630-631 (9th Cir.1987); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir.1985). The court has determined that this case is appropriate for summary judgment as the legal issues involved may be resolved on the basis of uncontroverted facts.

B. Applicable Level of Scrutiny

A critical issue in this case is what level of judicial scrutiny is appropriate to the review of § 533(b). Defendants contend that § 533(b) is an "antitrust measure" that only indirectly impacts speech and should be subjected only to the "rational basis review" applicable to such economic legislation. Thus, defendants argue, § 553(b) is constitutional if it is rationally related to a legitimate government objective.

Plaintiffs, however, argue that a higher level of scrutiny is required, because § 533(b) directly implicates the First Amendment as it prevents them from engaging in a speech and press activity. Further, plaintiffs argue that § 533(b) should be subject to the highest level of judicial scrutiny because it discriminates on the basis of the content of the plaintiffs' speech and discriminates between speakers. It is content-based, plaintiffs argue,

because the FCC must view the content of the programming in order to determine if it is "comparable to that provided by broadcast television stations in 1984," *FCC Video Dialtone Order*, 7 FCC Rcd. at 5820, and is therefore prohibited by § 533(b). The statute is said to discriminate between speakers because it imposes this restriction only on telephone companies. Thus, plaintiffs contend, as a content-based restriction on speech it is "presumptively invalid." *R.A.V. v. City of St. Paul*, —— U.S. ——, ——, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992). To survive the applicable strict scrutiny, a content-based restriction must be "necessary to serve a compelling state interest . . . [and] narrowly drawn to achieve that end." *Id.*

In the alternative, plaintiffs argue that § 533(b) is subject to at least intermediate level First Amendment scrutiny, thus requiring the statute to pass the test developed in *U.S. v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), and its progeny.

This court agrees with plaintiffs that § 533(b) must be scrutinized using a higher standard than mere rational basis review. The Supreme Court has recognized video programming as a protected form of speech. *See Leathers v. Medlock*, 499 U.S. 439, 444, 111 S.Ct. 1438, 1442, 113 L.Ed.2d 494 (1991) (cable television is speech for First Amendment purposes). Section 553(b) directly abridges the plaintiffs' right to express themselves by prohibiting them from engaging in video programming. Section 533(b) is not a generally applicable economic law, nor does it concern the physically-limited airwaves of broadcast television. Therefore, the antitrust and broadcast cases cited by defendants are inapposite.

In any case, even if the statute were directed at non-speech activity, as defendants contend, it must be subjected to heightened scrutiny as it "impose[s] a disproportionate burden upon those engaged in protected First Amendment activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704, 106 S.Ct. 3172, 3176, 92 L.Ed.2d 568 (1986). *See also, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581, 103 S.Ct. 1365, 1369-70, 75 L.Ed.2d 295 (1983); *C & P*, 830 F.Supp. at 921-922 (the "Supreme Court has never accorded mere rationality review to a statute, even a 'structural' economic regulation, that, on its face, prohibited a specific category of speakers from engaging in a protected form of speech," citing *Arcara*, 478 U.S. 697, 106 S.Ct. 3172). At a minimum, therefore, the intermediate level of scrutiny as developed in *O'Brien* and subsequent cases, applies.

Intermediate scrutiny requires that restrictions on speech be "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)).

The parties correctly focus their attention on whether or not § 533(b) is sufficiently "narrowly tailored." To be "narrowly tailored" a restriction on speech "need not be the least-restrictive or least-intrusive means" of serving the governmental interest, *Ward*, 491 U.S. at 798-799, 109 S.Ct. at 2757-58, but it may not "burden substantially more speech than is necessary to further the government's

legitimate interests." *Id.*, at 799, 109 S.Ct. at 2758. A relevant consideration for the court in making this determination is the reasonableness of the "fit" between ends and means. *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——,——, n. 13, 113 S.Ct. 1505, 1510, n. 13, 123 L.Ed.2d 99 (1993). In addition, the restriction may not "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals," *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758, and must "sufficiently serve those public interests that are urged as its justification" to be constitutional. *U.S. v. Grace*, 461 U.S. 171, 181, 103 S.Ct. 1702, 1709, 75 L.Ed.2d 736 (1983).

Because the court finds that § 533(b) fails to meet the narrowly tailored requirement of the *O'Brien* test and therefore fails the intermediate level of review, it is unnecessary to consider the application of the strict scrutiny test suggested by plaintiffs, as the statute would, *a fortiori*, fail that more stringent test.

C. Application of Intermediate Scrutiny

Section 533(b), when first adopted by the FCC as a regulation in 1970, and when enacted by Congress in 1984, may indeed have been narrowly tailored to serve the needs of the infant cable industry as it existed then. However, both sides in this case recognize that the cable industry has undergone radical changes and developments in the intervening years. As § 533(b) directly affects plaintiffs' First Amendment rights, this court must review the question of whether the statute is sufficiently narrowly tailored, in light of present circumstances, to justify its sweeping exclusion of plaintiffs from video programming activity. *See C & P*, 830 F.Supp. at 927.

In determining whether § 533(b) is "narrowly tailored to serve a significant governmental interest," the court must look to the present, "inevitable effect" and "necessary scope and operation" of the statute, *O'Brien*, 391 U.S. at 384, 88 S.Ct. at 1683, and "to the face of the regulation and the identifiable interests advanced to justify the regulation." *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415, 1426 (4th Cir.1989), *vacated on other grounds*, 496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990); *see also Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 829 (4th Cir.1979), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980); *See also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 2838, 106 L.Ed.2d 93 (1989) (it is the court's "task in the end to decide whether Congress has violated the Constitution" and legislative findings of fact "would not foreclose our independent judgment of the facts bearing on an issue of constitutional law").

The defendants assert that § 533(b) serves to promote competition and to provide diversity of video programming because by keeping plaintiffs out of the business of providing video programming in their telephone service areas, § 533(b) prevents potential anticompetitive behavior by the telephone companies. The defendants have identified two potential anticompetitive practices in particular: the potential for discrimination in access to telephone poles and conduits and the possibility of cross-subsidization between regulated telephone service and non-regulated video programming. In addition, defendants argue that the telephone companies have monopolistic tendencies which predispose them to anticompetitive behavior. The court addresses each of these asserted rationales in turn.

1. Pole and Conduit Access Discrimination

Defendants argue that telephone companies can discriminate against competitors by limiting pole and conduit access. The Pole Attachment Act of 1978, 47 U.S.C. § 224, has addressed the concerns about pole and conduit access, giving the FCC power to regulate the terms and conditions of pole attachments. In addition, cable service is now available, meaning that the cables are already in place, at 96% of all U.S. homes, as opposed to 9% in 1970. As a result, the FCC has concluded that there is "little threat that the local telephone companies could preemptively eliminate competition" in the video programming market by discriminating in pole access. *Video Dialtone Order*, 7 FCC Rcd. at 5849. Finally, as the *C & P* court discussed at length, telephone companies are already permitted, and do, engage in video transport services, the area in which potential problems of access are most relevant. *See C & P*, 830 F.Supp. at 929-931. Finally, any remaining access issues, if there are any, could be resolved by measures much less drastic than a total video programming ban which would not deprive plaintiffs of this important expressive opportunity. As it stands now, with respect to pole access, § 533(b) "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.*, 491 U.S. at 799, 109 S.Ct. at 2758.

2. Cross-Subsidization

Defendants contend that without § 533(b) the telephone companies will subsidize their video programming activities by passing on those costs to their telephone ratepayers. By improperly allocating the costs of the video programming to telephone ratepayers the telephone companies could earn supercom-

petitive profits which would enable them to undercut their competition and eventually the telephone companies might develop a monopoly in the video programming market. However, the FCC already has detailed cost allocation and accounting rules governing nonregulated activities of telephone companies to prevent cross-subsidization or cost-shifting to ratepayers. *See Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities*, Report and Order, 2 FCC Rcd. 1298, Reconsid. Order, 2 FCC Rcd 6383 (1987), Order on Further Reconsid., 3 FCC Rcd. 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C.Cir.1990). The FCC itself, in its Video Dialtone Order, stated that

> our existing safeguards with respect to nonregulated [telephone company] services are sufficient at this time to protect against cross-subsidization concerns . . . . we continue to believe that they constitute an effective means of preventing cross-subsidization between regulated and nonregulated services.

7 FCC Rcd. at 5828-5829. Thus, there is a lack of the required "fit" between the restrictions of § 533(b) and its purported purpose in preventing cross-subsidization.

3. Monopolistic Tendencies

Defendants argue that given the past history of monopolistic practices on the part of some telephone companies, together with their size and position in the marketplace, the public interest will best be served by excluding telephone companies from video programming. However, it is clear that in a direct sense the current ban actually *reduces* diversity of programming and *reduces competition* because it

prohibits an entire group of potential video programmers from participating in the market and permits the near-absolute monopoly currently enjoyed by cable companies to remain undisturbed.

The plaintiff telephone companies agree that they are subject to the general antitrust statutes already in existence. In fact the Department of Justice "disagree[d] with those parties who argue that allowing the LECs to own and provide their own video programming will not be procompetitive because it will allow them to engage in anticompetitive behavior . . . ," *DOJ Cross-Ownership Rules Reply*, CC Docket No. 87-266, at 46, nt. 50, and accordingly recommended the repeal of § 533(b).

In the recommendations of the FCC, the NTIA and DOJ to Congress, advocating the repeal of § 533(b), various additional controls, all less restrictive of speech than § 533(b), have been suggested which would address the concerns of defendants and would prevent monopolistic behavior by the telephone companies. Such recommendations include imposing a cap on the percentage of channel capacity which may be used by the telephone company for providing its own programming, with the balance available to be leased on a common carrier basis to other programmers, *Video Dialtone Order*, 7 FCC Rcd. at 5850, as well as requiring that "the telephone companies provide video programming through a structurally separated video programming subsidiary." *Id.*, at 5847, para. 135.

Thus, despite the defendants' statements, there is no convincing evidence in the record that other current methods of regulating anti-competitive behavior would be ineffective. In addition, § 533(b) burdens substantially more speech than is necessary to effectuate the government's goals.

III. CONCLUSION

The complete ban on telephone company participation in the provision of video programming in their service areas is an unnecessarily severe means of achieving the government's objectives. In fact, based on the evidence submitted, it appears that § 533(b) does not actually serve the interests it allegedly advances, and if it does serve these objectives, it does so in a manner that sacrifices the First Amendment rights of plaintiffs. As seen in the recommendations by the relevant expert federal agencies (the FCC, the NTIA, and the DOJ Antitrust Division), there are numerous alternatives to the complete prohibition, which would serve to advance and accomplish the same pro-competitive goals advanced by the defendants in this case, while not eliminating an important speech and press opportunity. Furthermore, there is always the concern for the public interest. A serious result of the ban is to deprive the public of access to a greater number of choices in video programming as well as the possibility of competitive pricing, directly contrary to the objectives defendants contend it serves.

The Supreme Court has held that " '[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching on our most precious freedoms.' " *Edenfield v. Fane*, —— U.S. ——, —— - ——, 113 S.Ct. 1792, 1803-1804, 123 L.Ed.2d 543 (1993) (quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340-41, 9 L.Ed.2d 405 (1963)). In the case at hand, there is a lack of the required "fit" described in *Discovery Network*, —— U.S. at ——, n. 13, 113 S.Ct. at 1510, n. 13 (1993), between § 533(b) and the interests identified by defendants.

As evidenced by the recommendations of the FCC, the NTIA, and the Antitrust Division of the DOJ, the cable industry has changed and regulatory alternatives exist that would permit video programming by telephone companies without the negative consequences identified by the defendants. The court finds that § 533(b) is not "narrowly tailored to serve a significant governmental interest," but instead, that the statute "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758.

Section 533(b) fails to meet the "narrowly tailored" requirement of the *O'Brien* test of constitutionality of restrictions on speech activity. The court finds it unnecessary to determine whether § 533(b) meets the other requirements of the *O'Brien* test, or whether the statute would survive strict scrutiny review. Accordingly, plaintiffs' motion for summary judgment is GRANTED and defendants' motion for summary judgment is DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-93-20915 JW

PACIFIC TELESIS GROUP, ET AL.,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

CALIFORNIA CABLE TELEVISION ASSOCIATION,
DEFENDANT-INTERVENOR

[Filed May 31, 1994]

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs' motion for preliminary injunction came before the Court and was deemed submitted without oral argument on May 20, 1994.

On April 15, 1994, this Court stayed this action pending a decision by the Ninth Circuit Court of Appeals in *GTE California Incorporated v. FCC*, No. 93-70924, a lawsuit which raises, in part, the precise First Amendment issue in dispute in this action. A primary reason this action was stayed is that the Ninth Circuit's decision in the *GTE* case may constitute determinative and controlling precedent applicable to this action.

Another reason this action was stayed was to alleviate the significant burden placed on the judicial system and the parties by duplicative or premature litigation. The decision to stay this action was

rendered after careful consideration of the parties' arguments and concerns, including the important First Amendment issue, which is at the core of this action.

Notwithstanding the Court's order staying this action, Plaintiffs have filed a motion for preliminary injunction. In an April 29, 1994, letter to the Court, Plaintiffs' stated, "The Court's order granting the motion to stay simply 'continues' the briefing and hearing dates scheduled by the parties; it does not prohibit plaintiffs from seeking interim relief." However, the Court's April 15, 1994 order plainly stated that the action was stayed. It did not limit the stay in any way. The breadth of the stay was indicated when the Court "*further* ordered" that the briefing schedule and all other dates were continued pending further proceedings in the *GTE* case. Plaintiffs' assertion that this Court's ruling somehow left them free to continue to litigate the identical issues presented in their motion for summary judgment is bewildering. The inappropriateness of Plaintiffs' motion for preliminary injunction is further shown by the fact that their proposed injunction seeks to alter the status quo of the parties, rather than to maintain it pending resolution on the merits. This action is, and remains, stayed.

Accordingly, having reviewed the pleadings and considered the parties' arguments, the court hereby DENIES Plaintiffs' motion for preliminary injunction.

Dated: May 27, 1994

/s/ James Ware
HONORABLE JAMES WARE
United States District Judge

APPENDIX E

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

FCC 95-203

CC DOCKET NO. 87-266

IN THE MATTER OF TELEPHONE COMPANY-CABLE TELEVISION
Cross-Ownership Rule, Sections 63.54-63.58

THIRD REPORT AND ORDER

Adopted: May 16, 1995
Released: May 16, 1995

By the Commission:

I. INTRODUCTION

1. In this *Third Report and Order*, we adopt the tentative conclusion set forth in the *Fourth Further Notice of Proposed Rulemaking* ("*Fourth FNPRM*")[1] in the above captioned docket regarding our legal authority to waive Section 613(b) of the Communications Act, 47 U.S.C. § 533(b). Section 613(b) generally prohibits telephone companies from providing "video programming directly to subscribers

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[1] *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, FCC 95-20, Fourth Further Notice of Proposed Rulemaking (released Jan. 20, 1995) ("*Fourth FNPRM*").

in the[ir] telephone service area." However, the statute expressly authorizes us to waive the restriction "where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by" a telephone company "or upon other showing of good cause." For the reasons set forth below, we conclude that Section 613(b)(4) authorizes us to grant waivers to allow telephone companies to provide video programming directly to subscribers in their telephone service areas under certain conditions. In particular, in response to decisions of the Fourth and Ninth Circuits, we conclude that under Section 613(b)(4) we have the legal authority to grant waivers allowing telephone companies to provide video programming in their telephone service areas on video dialtone networks. We adopt that construction of the waiver provision because it is fully consistent with the language of the statute and Section 613(b)'s underlying policy, and because waiving the restriction in that manner obviates the constitutional infirmities identified by the courts of appeals. We do not decide any other issues raised in the *Fourth FNPRM* in this Order. In particular, we do not decide whether telephone companies may provide video programming over video dialtone networks rather than as traditional cable operators. In addition, if a telephone company is permitted to provide video programming on a video dialtone system, we are not here deciding whether that telephone company should be regulated under Title II or Title VI of the Communications Act. Nor do we decide the conditions under which telephone companies may be granted waivers to provide traditional cable service in their telephone service areas.

Those issues and others will be decided in a subsequent order.

II. BACKGROUND AND SUMMARY

2. Section 613(b), which is sometimes referred to as the "cable-telco cross-ownership rule," prohibits a telephone company from operating a cable system where it has a monopoly on local telephone service. More specifically, although Section 613(b) does *not* bar a telephone company from acting as a conduit to carry video programming selected and provided by an unaffiliated party, it *does* generally bar a telephone company from selecting (or "exerting editorial control over") and providing the video programming carried over its wires in its local service area. Two courts of appeals, the Fourth and Ninth Circuits, have recently held Section 613(b) unconstitutional.[2] At the heart of both decisions is the conclusion that the statute unnecessarily limits speech by telephone companies because it prohibits them from choosing the video programming to be provided in their local exchange telephone service areas *altogether*. In so holding, both courts referred to the Commission's 1992 recommendation to Congress in our video dialtone docket, a proposal that the Ninth Circuit described in *US West* as a "more speech-friendly plan" than the absolute ban contained in the statute.[3] Under the Commission's legislative recommendations, as described by the Fourth Circuit in *C & P*,

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[2] *See US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1995) (*US West*); *Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994) (*C & P*).

[3] *US West*, 48 F.2d at 1105, citing *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5850 (1992) (*Video Dialtone Order*).

"telephone companies' editorial control over video programming [would be limited] to a fixed percentage of the channels available; the telephone companies would be required to lease the balance of the channels on a common carrier basis to various video programmers."[4] In short, the courts of appeals have held that a complete ban on editorial control over video programming in a telephone company's service area " 'burden[s] substantially more speech than is necessary,' " especially since there appeared to be an " 'obvious less-burdensome alternative[]' "—allowing the telephone company to provide some video programming in their telephone service areas on a video dialtone system.[5]

3. We now conclude, as we previously proposed in the *Fourth FNPRM*, that we have the authority to grant waivers to telephone companies pursuant to Section 613(b)(4) allowing them to provide video programming directly to subscribers in their telephone service areas over video dialtone networks. Section 613(b)(4) provides that upon a showing of "good cause" the Commission may waive the cable-telco cross-ownership restriction where a waiver is "justified by the particular circumstances . . . , taking into account the policy" underlying the cross-ownership restriction.[6] Our current video dialtone

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[4] *C & P*, 42 F.3d at 202, citing *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5850-5851 (1992).

[5] *Id.*, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 930 (E.D. Va. 1993).

[6] We have waived the cable-telco cross-ownership rules on a number of occasions. Typically, these waivers have been sought on a temporary basis for experimental purposes, or to allow telephone companies to come into compliance with our

rules, which are based on fundamental principles of common carriage, are designed to enhance competition in the multichannel video distribution market by providing multiple video programmers access to end user subscribers over the telephone company's network.[7] Consistent with this common carrier model, our current video dialtone rules generally preclude any one programmer from serving as an "anchor programmer" and hence monopolizing the channels on the system. Waivers authorizing telephone companies to provide video programming in those circumstances will advance the policy underlying the cross-ownership restriction, which was enacted to promote competition in the multi-channel video programming market.[8]

4. Construing the waiver provision to authorize telephone companies to provide video programming over video dialtone networks avoids the constitutional infirmity identified by the Fourth and Ninth Circuits by making available the "'obvious less-burdensome alternative'" referenced by those courts.[9] Moreover, it is our duty to so construe the statute. The

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cross-ownership rules by, for example, divesting cable holdings acquired after mergers. *See, e.g., Timer Warner Entertainment Co., L.P. and US West Communiccations, Inc.*, 8 FCC Rcd 7106 (1993).

[7] *See Video Dialtone Order*, 7 FCC Rcd 5781 (1992), *aff'd in part and modified in part on recon.*, 10 FCC Rcd 5781 (1994) *Telephone Company-Cable Cross-Ownership Rules, Section 63-54-63.58, Memorandum Opinion and Order and Reconsideration and Third Further Notice of Proposed Rulemaking (Video Dialtone Reconsideration Order), petition for review pending sub nom. Mankato Citizens Tel. Co. v. FCC*, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

[8] *See NCTA v. FCC*, 914 F.2d 285, 287 (D.C. Cir. 1990) ("the policy [of Section 613(b)] is to promote competition").

[9] *See C & P*, 42 F.3d at 202; *US West*, 48 F.3d at 1104.

Supreme Court has recently reiterated in *United States v. X-Citement Video, Inc.* that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions."[10] Thus, as the agency charged with implementing the Communications Act, we should construe it in a manner that renders it constitutional, and the decisions invalidating Section 613(b)(4) plainly show that, absent a waiver allowing telephone companies to offer video programming over video dialtone networks, there is a serious question as to whether Section 613(b) unnecessarily burdens substantially more speech than is necessary to promote competition in the multichannel video programming market.[11]

5. In light of the ongoing litigation concerning the constitutionality of Section 613(b), we have decided to adopt the construction of Section 613(b)(4) that we proposed in the *Fourth FNPRM* before answering the other questions presented in this rulemaking. The Supreme Court will soon have to decide whether to review the Fourth Circuit's decision in the *C & P* case. A rehearing petition is pending in the Ninth

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[10] *United States v. X-Citement Video*, 115 S. Ct. 464, 467 (1994).

[11] While the courts have identified video dialtone as a possible means by which telephone companies could provide programming in their service areas to remedy the constitutional infirmities of Section 613(b), and while we agree with the suggestion of these courts that waiving Section 613(b) as discussed above will cure these constitutional infirmities, we will address the terms and conditions under which telephone companies should be permitted to provide video programming directly to subscribers in their local service areas in a subsequent order addressing the other issues raised in the *Fourth FNPRM*.

Circuit in the *US West* case.[12] In addition, a number of district courts have issued injunctions barring enforcement of Section 613(b), and some of those decisions have been appealed.[13] By implementing a "more speech-friendly plan" pursuant to the waiver authority granted in Section 613(b)(4), we make it unnecessary for those courts to decide whether a complete prohibition on video programming by telephone companies in their exchange areas is constitutional.

III. DISCUSSION

6. On account of the cable-telco cross-ownership ban, in our initial video dialtone orders we envisioned telephone companies providing a common carrier platform over which others would transmit programming.[14] In the ongoing trials of video dialtone service, some programmers are "packagers"—that is, they provide packages of multiple channels, much like a

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[12] In February, the government suggested that the Ninth Circuit hold the rehearing petition in abeyance while the Commission considers the issue we decide today, and the Ninth Circuit has not yet acted on the rehearing petition. *See* Appellants' Petition for Rehearing and Suggestion for Rehearing *En Banc*, Ninth Cir. No. 94-35775 (filed Feb. 10, 1995).

[13] *See NYNEX Corp. v. United States*, No. 93-1523 (D. Me. December 8, 1994), appeal pending 1st Cir. No. 95-1183; *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994), appeal pending 7th Cir. No. 95-1223; *BellSouth Corp. v. United States*, Civ. A. No. 3-93-1024 (N.D. Ala. 1994), appeal pending 11th Cir. No. 94-7036; *United States Telephone Association v. United States*, No. 1:94CV1961 (D.D.C.), appeal pending D.C. Cir. No. 95-5117; *Southwestern Bell Corporation v. United States*, Civil Action No. 3:94-C-0193-D (N.D. Tex. March 27, 1995); and *Southern New England Telephone Co.*, No. 3:94-CV-80 (DJS) (D. Conn. April 28, 1995).

[14] *See Video Dialtone Order*, 7 FCC Rcd 5781 (1992); *Video Dialtone Reconsideration Order*, 10 FCC Rcd 244 (1994).

cable operator—while other programmers provide individual channels. In light of the court decisions granting injunctions to telephone companies barring the enforcement of the cable-telco cross-ownership rule,[15] we have authorized two telephone companies conducting video dialtone trials to select and provide some of the video programming to be carried over their video dialtone systems subject to certain conditions adopted in those orders and any subsequent safeguards that the Commission determines will be necessary.[16] In the *Fourth FNPRM*, we asked for comment on the terms and conditions under which local telephone companies should be permitted to provide video programming directly to subscribers in their local service areas. For instance, we asked whether we should permit them to do so over video

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[15] *See Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), rehearing denied (Jan. 18, 1995); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *aff'd, US West, Inc. v. United States*, 48 F.2d 1092 (9th Cir. 1995); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, No. 93-1523 (D. Me. Dec. 8, 1994); *GATE South, Inc. v. United States*, No. 94-1588-A (E.D. Va. January 13, 1995); *Southwestern Bell Corporation v. United States*, Civil Action No. 3:94-C-0193-D (N.D. Tex. March 27, 1995); *United States Tel. Ass'n v. United States*, No. 1:94CV01961 (D.D.C. Feb. 14, 1995); and *Southern New England Telephone Co.*, No. 3:94-CV-80 (DJS) (D. Conn. April 28, 1995).

[16] *See Bell Atlantic Telephone Companies, Order and Authorization*, FCC 95-15, File No. W-P-C 6834 (released Jan. 20, 1995) ("*Bell Atlantic Market Trial and Authorization*"); *BellSouth Telecommunications Inc., Order and Authorization*, DA 95-181, File No. W-P-C-6977 (Com. Car. Bur. released February 8, 1995) ("*Bell South Market Trial Order and Authorization*").

dialtone systems.[17] A key issue in the *Fourth FNPRM* is whether such a telephone company is subject to regulation as a common carrier under Title II of the Communications Act, as a cable operator under Title VI of the Act, or under some combination of the statutory provisions governing those sorts of companies.[18] Additional issues involve the sorts of safeguards that are needed to ensure that the telephone company, acting in its capacity as the transporter of video signals, does not discriminate against independent programmers in favor of its affiliated programmer.[19] We do not resolve those issues or others posed by the *Fourth FNPRM* today. However, we construe Section 613(b)(4), the waiver provision, as authorizing us to permit telephone companies to act as programmers on video dialtone systems pursuant to certain conditions. The remaining issues raised in the *Fourth FNPRM* will be resolved in a further order in this proceeding.

7. Two statutory issues are presented in construing Section 613(b)(4): (1) whether "good cause" exists to waive the statutory restriction to permit a telephone company that wants to provide programming in its service area to do so over a video dialtone system, and (2) whether "the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection," when a telephone company requests waiver of Section 613(b) to provide video programming over a video dialtone system.[20] The commenters have paid scant attention

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[17] *See Fourth FNPRM* at para. 10.

[18] *Id.* at para. 9.

[19] *Id.* at paras. 20-41.

[20] 47 U.S.C. Section 533(b)(4).

to these issues, but we believe that an explanation is warranted as to why there is good cause for granting a waiver under circumstances that will promote competition in the multi-channel video programming market.

8. As the D.C. Circuit recognized in its 1990 *NCTA v. FCC* decision, "the policy [of Section 613(b)] is to promote competition."[21] Congress enacted Section 613 "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets."[22] The House Report on the 1984 Cable Act explained that Congress's intent in enacting Section 613(b) was "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers,"[23] and the Commission adopted those rules in 1970 to "preserv[e], to the extent practicable, a competitive environment for the development and use of broadband cable facilities and service and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities."[24] That is, when the Commission adopted its cable-telco cross-ownership rules in 1970, it sought to prevent the telephone companies

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[21] *NCTA v. FCC*, 914 F.2d at 287.

[22] H.R. Rep. No. 934, 98th Cong., 2d Sess. 55 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4692.

[23] H.R. Rep. No. 934 at 56, *reprinted in* 1984 U.S.C.C.A.N. at 4693.

[24] *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems; Final Report and Order*, 21 FCC 2d 307, 325 (1970) ("*Cable-Telco Cross-Ownership Rules Order*"), *reconsidered in part*, 22 FCC 2d 746 (1970), *aff'd sub* [*nom.*] *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

from using their monopoly position to preempt the market for cable service by excluding others from entry.[25] The Commission explained that it sought to avoid extending, "without need or justification, the telephone company's monopoly position to broadband cable facilities and the new and different services such facilities are expected to be providing in the future."[26] Since 1970, however, the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households and "has replaced over-the-air broadcast television as the primary provider of video programming."[27] While Congress's interest in promoting diverse information sources and discouraging anti-competitive abuses remains highly relevant in today's video marketplace, its concern with ensuring that the cable industry not be extinguished before it is established is no longer relevant. "Good cause" is a phrase that is commonly associated with changed circumstances.[28] The relevant circumstances have changed greatly since the Commission adopted its cross-ownership rules in

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[25] The Commission specifically sought to curtail the opportunities telephone companies would otherwise have to take advantage of their monopoly control over the conduits and telephone poles required for the transmission of video programs to cable subscribers. *Cable-Telco Cross Ownership Rules Order*, 21 FCC 2d at 324.

[26] *Id.* at 324.

[27] *Turner Broadcasting System, Inc. v. United States*, 114 S. Ct. 2445, 2454 (1994), citing Section 2(a)(17) of the 1992 Cable Act.

[28] *See, e.g., Illinois v. ICC*, 713 F.2d 305, 310 (7th Cir. 1983); *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981).

1970 and Congress "modeled [Section 613(b)] after the FCC['s] rules"[29] in 1984.

9. We also conclude that significant advances in technology have changed the circumstances relevant to determining whether telephone companies should be permitted to provide video programming directly to subscribers in their service areas.[30] When Congress enacted the cable-telco cross-ownership restriction, telephone companies did not have the technology available to them to deliver video signals over the networks they used to provide common carrier telephone service, much less the capability and capacity to provide access to a multitude of video programmers. However, as the D.C. Circuit has recently recognized, since the mid-1980s "technology was advancing rapidly and the once clear line between the provision of video and the provision of voice service was blurring."[31] That is, fiber-optic systems, digitization, and other technological advances have made it possible to transmit video signals over integrated facilities rather than over separate networks and have greatly expanded the capacity of

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[29] *GTE California, Inc. v. FCC*, 39 F.2d [*sic*] 940, 942 (9th Cir. 1994) (*GTE California*).

[30] Technological advances have long been an accepted basis upon which good cause has been found to justify waiving the cable-telco cross-ownership restriction. In its 1978 *Clarification Order*, the Commission clarified the criteria we would use in granting good cause waivers; the Commission stated that, in particular, we would consider recent technological developments as a justification for a good cause waiver. This standard was cited with approval by the court in *NCTA v. FCC* (1990). *Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television "Cross Ownership Rules"* 69 FCC 2d 1097, 1110-111 (1978) ("*Clarification Order*"); *NCTA v. FCC* (1990), 914 F.2d at 289.

[31] *NCTA v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994).

these facilities.[32] These developments have made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban. These technological developments also support the conclusion that "good cause" exists to authorize telephone companies to provide video programming within their service areas where that will promote competition in the multichannel video programming market.

10. We also conclude that the rules we will promulgate in the immediate future to authorize telephone companies to provide video programming in their service areas will constitute "particular circumstances . . . , taking into account the policy" of Section 613(b). While we have not yet adopted definitive rules governing the conditions under which telephone companies may be permitted to act as video programmers over their video dialtone systems, the outline of two of those requirements is clear. First, video dialtone necessarily includes a common carriage element, and we have previously concluded that a telephone company may not allocate all or substantially all of its capacity to a single "anchor programmer."[33] Accordingly, a telephone company providing video dialtone service is not allowed to occupy all of the channels provided by the system, but has a common carrier obligation to make capacity available to others.[34] The common carrier aspect of

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[32] *See id.*

[33] *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 260.

[34] In authorizing Bell Atlantic and BellSouth to provide programming to subscribers [as] part of their video dialtone trials, we required them to make 50% of their system's capa-

video dialtone service promotes both competitive and free speech interests by making room for more than one speaker. Second, our current video dialtone rules contain provisions intended to ensure that telephone companies providing video programming directly to subscribers do not discriminate in favor of their affiliated programmers and do not subsidize video programming operations with rates collected from their provision of monopoly telephone services.[35] These restrictions are intended to promote the underlying purpose of Section 613(b) by fostering fair competition in the multi-channel video programming market.[36]

11. Construing the waiver provision to authorize telephone companies to provide video programming

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city available to unaffiliated programmers. *See Bell Atlantic Market Trial and Authorization* at paras. 31, 65(d); *BellSouth Market Trial and Authorization* at paras. 17, 52(a).

[35] The Commission has developed a number of safeguards that are designed to prevent cross-subsidization and discrimination when telephone companies provide "enhanced services." The safeguards against cross-subsidization include accounting and cost allocation rules that separate nonregulated service costs from the costs associated with providing basic regulated telephone service. The non-discrimination safeguards include a variety of rules designed to ensure that unaffiliated enhanced service providers have access to the network on the same basis as affil[i]ated enhanced service providers and are not otherwise unfairly disadvantaged. In the ongoing rulemaking proceeding in this docket, we will decide what safeguards are needed when telephone companies provide video programming over video dialtone systems.

[36] It is possible that we will decide in the ongoing rulemaking proceeding that telephone companies ought to be permitted to provide traditional cable service, rather than participate as programmers on video dialtone systems, under "particular circumstances" that will promote competition in the multichannel video programming market.

pursuant to our video dialtone rules obviates the constitutional difficulties associated with Section 613(b). Specifically, the Fourth Circuit and Ninth Circuit have held that the cable-telco cross-ownership restriction "burden[s] substantially more speech than is necessary" to promote the government's interest in promoting a competitive multichannel video programming market.[37] Waiving Section 613(b) to allow telephone companies to offer video programming in their service areas over video dialtone platforms, however, constitutes implementation of the "obvious less burdensome alternative" to the ban identified by the Fourth Circuit.[38] Or, to quote the Ninth Circuit, it implements the "more speech-friendly plan" that allows telephone companies "to compete in the video programming market" while "requiring that a portion of their transport volume be set aside for sale to unaffiliated third parties on a common carrier basis."[39] As a result of our construction of the waiver provision, telephone companies' free speech interests are not unduly burdened. Telephone companies have always been permitted to provide video programming directly to subscribers in all areas of the country outside of their service areas. In addition, they may produce video programming and provide it to unaffiliated broadcasters, cable operators, or other mass media outlets both within and outside of their service

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[37] *See C & P*, 42 F.3d at 202.

[38] We recognize that the Fourth Circuit reserved judgment on the constitutionality of our recommended model. *C & P*, 42 F.3d at 202 n.34. However, if that recommended approach does not render the statute constitutional then, contrary to the court's holding, it is not "'obvious less-burdensome alternative,'" because it is no alternative at all. *Id.* at 202.

[39] *US West*, 48 F.3d at 1105.

areas.[40] Pursuant to the reading of the waiver provision we adopt today, telephone companies also may seek a waiver of the statutory restriction in order to provide programming directly to subscribers over video dialtone facilities where they have a monopoly on local exchange telephone service. Thus, under our reading of the statute, telephone companies have abundant opportunities to speak.

12. The fact that waiver of the cable-telco cross-ownership restriction obviates the constitutional difficulties identified by the courts of appeals supports our decision to construe our waiver authority to permit telephone companies to provide video programming over video dialtone systems. As the Supreme Court recently reiterated in *X-Citement Video*, "a statute is to be construed where fairly possible so as to avoid constitutional questions."[41] In other words, when given a choice between a permissible construction that would avoid constitutional problems and one that raises constitutional doubts, "[i]t is incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress."[42] The Court also articulated this principle in *Jean v. Nelson*, when it found that "[p]rior to reaching any constitutional questions federal courts must consider nonconstitutional grounds for decision."[43]

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[40] *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 280-281.

[41] *X-Citement Video*, 115 S.Ct. at 467.

[42] *Id.* at 462.

[43] *Jean v. Nelson*, 472 U.S. 846, 854 (1985), *quoting Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981).

13. While the majority of commenters did not address the waiver issue, there was support among the commenters for our reading of the statute.[44] Several commenters, however, opposed our reading of the wavier provision, including a telephone company, Southwestern Bell, which argues that our proposal constitutes an evisceration of the rule.[45] That is not so. As we have explained, the purpose of the rule is to promote competition. It generally would not promote competition to allow a telephone company to purchase an incumbent monopolist cable operator in the telephone company's service area. But it *does* promote competition to allow a telephone company to provide video dialtone service in its telephone service area in competition with an existing cable company. Accordingly, it would eviscerate the statute if we were to waive Section 613(b) to allow telephone companies to provide video programming directly to subscribers in their service areas over video dialtone facilities *and*, as a general matter, to purchase cable systems in their telephone service areas that do not face competition. But we are not authorizing such waivers in this order. Instead, we conclude only that Section 613(b)(4) authorizes us to waive the cable-telco cross-ownership rule to permit a telephone company to provide video programming over video dialtone systems in its telephone service area in competition with existing cable operators, a result that *furthers* the purpose of the rule.[46]

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[44] *See* Comments of Southern New England Telephone.

[45] *See* Comments of Southwestern Bell at 43.

[46] We do not decide today whether we could grant a waiver authorizing a telephone company to build a traditional cable system in its telephone service area in competition with an existing cable system. Nor do we address the conditions under

14. Both the United States Telephone Association and US West invoke *Secretary of State of Maryland v. Munson*[47] to argue that the statute cannot be saved by its waiver provision.[48] But this case is not at all similar to *Munson*. The *Munson* case involved a 25% limitation on the percentage of funds a charitable organization could keep, on the theory that a charity that used less than 75% of the funds that it raised on charitable purposes was engaged in fraud. The Court invalidated the state statute imposing the limitation upon concluding that "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on the fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud."[49] Moreover, the Court concluded that the statute stifled speech and discriminated against certain viewpoints, explaining that "the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular."[50] The Court went on to hold that the statute was not saved by a provision allowing for waivers of the limitation. The Court stated that "[b]y placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free

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which a waiver might be warranted to allow a telephone company to purchase an in-region cable system.

[47] *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984).

[48] USTA Comments at 6; US West Reply Comments at 6.

[49] *Munson*, 467 U.S. at 966.

[50] *Id.* at 967.

speech."[51] "Particularly where the percentage limitation is so poorly suited to accomplishing the State's goal," the Court added, "and where there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity."[52] In this case, in contrast, permitting telephone companies to provide video programming over a video dialtone system plainly advances the goal of making programming for a variety of sources available to the public—a goal that furthers rather than hinders First Amendment interests. Unlike *Munson*, speech is not stifled and unpopular viewpoints are not disadvantaged. Moreover, no discretion remotely comparable to that in *Munson* would be lodged in any official to grant or deny particular waivers under our approach. Rather, as part of any decision under 47 U.S.C. § 214 authorizing a telephone company to construct facilities, we will routinely grant a waiver of Section 613(b) where the telephone company agrees to abide by the regulations we will establish governing its provision of video programming. Accordingly, there is no "threat of censorship that by its very existence chills free speech."[53]

15. In light of our duty to interpret Section 613(b) in a fashion that renders the statute constitutional, there is no merit at all to the suggestion by some commenters that the Commission's interpretation of Section 613(b)(4) is barred by res judicata, collateral estoppel,[54] or some unnamed principle that allegedly

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[51] *Id.* at 964 n.12.

[52] *Id.*

[53] *Id.*

[54] *See* Comments of Ameritech at 7.

prevents the Commission from construing a statute that a court has held unconstitutional.[55] In *X-Citement Video*, the Supreme Court read the federal child pornography statute in a manner that the Court acknowledged was not its "most natural grammatical reading" in order to avoid a serious constitutional issue after a court of appeals had held the statute unconstitutional.[56] In particular, the Court held that the statute required the government to prove that the defendant in a child pornography case knew that the material on which the prosecution was based contained child pornography even though the statute did not appear to contain such a scienter requirement.[57] In this case, in contrast, the language of the waiver provision is flexible, speaking of "good cause" and "particular circumstances . . ., taking into account the policy of this subsection." Unlike the Court in *X-Citement Video*, we do not have to strain to construe the waiver provision so that it renders the statute constitutional. Rather, as we have explained, we believe that such an interpretation is fully consistent with both the language of the waiver provision and the policy underlying Section 613(b), and therefore is the best interpretation of Section 613(b)(4). For those reasons, and in light of the fact that such an interpretation also avoids a serious constitutional issue, we now adopt our tentative conclusion that the waiver provision should be interpreted to authorize us to consider and approve requests by telephone

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[55] *See, e.g.*, Comments of Bell Atlantic at 29-30; Comments of NYNEX at 29; Comments of Southwestern Bell at 43; Reply Comments of US West at 6.

[56] *X-Citement Video*, 115 S.Ct. at 467.

[57] In fact, the dissenters in that case said that the Court gave the statute a construction "that its language simply will not bear." *Id.* at 473.

companies to provide video programming over video dialtone systems, subject to the rules we have enacted and any further rules we will enact to govern video dialtone systems.

16. Finally, we also conclude that our reading of Section 613(b)(4) is not foreclosed by the D.C. Circuit's 1990 decision in *NCTA v. FCC*. That case did not involve video dialtone service and presented no constitutional issue. It instead involved a waiver of FCC cross-ownership rules authorizing a cable operator to provide cable service over a telephone compan[y's] wires even though the cable operator was affiliated with the telephone company in violation of the rules by virtue of their joint interest in the contractor that was to build the cable system. The court acknowledged that the project "presents a number of advantages that might justify a good cause waiver."[58] However, it held that the Commission had "failed . . . to explain why any of these advantages require [the contractor's] participation as [the telephone companies'] contractor."[59] In this case, in contrast, in light of the decisions holding Section 613(b) unconstitutional, it is necessary to waive Section 613(b) to allow affiliates of telephone companies to provide video programming in order to render the statute constitutional. The Ninth Circuit recognized that a waiver might be warranted in these circumstances in *GTE California, Inc. v. FCC*,[60] a case that (unlike *NCTA v. FCC*) involved a constitutional challenge to Section 613(b). The Ninth Circuit stated in that case, in response to the argument that Section 613(b) is unconstitutional,

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[58] *NCTA v. FCC*, 914 F.2d at 289.

[59] *Id.*

[60] *GTE California, Inc. v. FCC*, 39 F.3d 940 (1994).

that "GTECA did not present the constitutional issue to the Commission at a point in this proceeding where it could have tried to obviate the constitutional question by granting discretionary relief, such as a permanent waiver."[61] As that statement recognizes, a waiver is warranted to implement what the Ninth Circuit in *US West* termed our "more speech-friendly plan"[62] and hence avoid a serious constitutional issue.

III. CONCLUSION

17. Accordingly, IT IS ORDERED that Section 613(b)(4) of the Communications Act is interpreted to authorize waivers permitting telephone companies to provide video programming directly to subscribers in their telephone service area pursuant to the rules we will adopt in this docket or related rulemaking proceedings.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[61] *Id.* at 946.

[62] *US West*, 48 F.3d at 1105.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-35775
D.C. No. CV-93-01523-BJR

US WEST, INC.; US WEST COMMUNICATIONS ; US WEST MULTIMEDIA COMMUNICATIONS INC.,
PLAINTIFFS-APPELLEES

and

WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION; PACIFIC TELECOM, INC. (PTI), AND ITS SUBSIDIARIES,
PLAINTIFFS/INTERVENORS-APPELLEES

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION; JANET RENO, ATTORNEY GENERAL,
DEFENDANTS-APPELLANTS

[Filed May 25, 1995]

ORDER

BEFORE: ALARCÓN and HALL, Circuit Judges, and KING, District Judge*

The panel has voted to deny appellants' petition for rehearing. Judge Hall has voted to reject the suggestion for rehearing en banc and Judges Alarcón and King recommend rejection.

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX G

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

No. 94-16064
D.C. No. CV-93-20915-JW

PACIFIC TELESIS GROUP; PACIFIC BELL; NEVADA BELL, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.; FEDERAL COMMUNICATIONS COMMISSION; JANET RENO, ATTORNEY GENERAL, DEFENDANTS-APPELLEES

and

CALIFORNIA CABLE TELEVISION ASSOCIATION, INTERVENOR-APPELLEE

[Filed May 25, 1995]

ORDER

Before: ALARCÓN and HALL, Circuit Judges, and KING, * District Judge

The panel has voted to deny appellees' petition for rehearing. Judge Hall has voted to reject the suggestion for rehearing en banc and Judges Alarcón and King recommend rejection.

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* The Honorable Samuel P. King, Senior District Judge for the District of Hawaii, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX H

Section 613(b) of the Communications Act of 1934, as amended, 47 U.S.C. 533(b), provides:

Common carriers; direct video programming; exception; waiver

(1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

(2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

(3) This subsection shall not apply to any common carrier to the extent such carrier provides telephone exchange service in any rural area (as defined by the Commission).

(4) In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such

waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.